No. 98-238-CFX Title: Togo D. West, Jr., Secretary of Veterans Affairs, Petitioner
v.
Michael Gibson

Docketed:
August 5, 1998 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Aug 5 1998	Petition for writ of certiorari filed. (Response due October 19, 1998)
	Sep 1 1998	Order extending time to file response to petition until October 5, 1998.
	Oct 6 1998	Order further extending time to file response to petition until October 19, 1998.
	Oct 28 1998	DISTRIBUTED. November 13, 1998
	Nov 6 1998	Response requested.
	Nov 20 1998	Brief of respondent Michael Gibson in opposition filed.
	Dec 2 1998	REDISTRIBUTED. January 8, 1999
	Dec 10 1998	Reply brief of petitioner Togo West, Jr., Secretary of Veterans Affairs filed.
	Jan 11 1999	REDISTRIBUTED. January 15, 1999
	Jan 15 1999	Petition GRANTED. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, February 25, 1999. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 24, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel or or before 3 p.m., Monday, April 12, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT April 26, 1999. **********
	Feb 22 1999	Joint appendix filed.
	Feb 25 1999	Brief of petitioner Togo D. West, Secretary, Dept. of Veterans Affairs filed.
	Feb 25 1999	Brief amicus curiae of Aamerican Federation of Government Employees, AFL-CIO filed.
	Feb 25 1999	Brief amicus curiae of National Employment Lawyers Association filed.
	Mar 11 1999	Record filed.
	Mar 12 1999	CIRCULATED.
	Mar 25 1999	Brief of respondent Michael Gibson filed.
	Apr 12 1999	Reply brief of petitioner Togo West, Secretary, Department of Veterans Affairs filed.
	Apr 26 1999	ARGUED.

No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

TOGO D. WEST, JR., SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, PETITIONER

v.

MICHAEL GIBSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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59 pp

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission has the authority to award compensatory damages against agencies of the federal government for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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MICHAEL GIBSON

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of the Department of Veterans Affairs, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 137 F.3d 992. The opinion of the district court (App., *infra*, 15a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1998. A petition for rehearing was denied on May 7, 1998. App., *infra*, 29a-30a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title 42 of the United States Code are set forth at App., *infra*, 31a-35a.

STATEMENT

This case concerns the authority of the Equal Employment Opportunity Commission (EEOC) to award compensatory damages against agencies of the federal government on claims of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

1. In 1972, Congress extended to the federal government Title VII's prohibition against employment discrimination on the basis of "race, color, religion, sex or national origin." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. 2000e-16 (Supp. II 1996)); see *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 825 (1976) ("Until it was amended in 1972 * * *, Title VII did not protect federal employees."). But Title VII was not to apply to the federal government in precisely the same manner that it applied to other employers. Congress crafted a distinct set of "administrative and judicial enforcement mechanisms," *Brown*, 425 U.S. at 831, for claims of employment discrimination asserted by federal employees and applicants for federal employment.[1]

[1] Section 2000e-16 currently applies to civilian employees or applicants for employment in executive agencies, military departments, the Postal Service, the Postal Rate Commission, the Government Printing Office, the General Accounting Office, the Library of Congress, and those units of the judicial branch of the federal government and of the District of Columbia government having positions in the competitive service. 42 U.S.C. 2000e-16(a) (Supp. II 1996).

Congress delegated initially to the Civil Service Commission, and later to the EEOC,[2] the authority to "enforce" Title VII against the federal government "through appropriate remedies, including reinstatement or hiring of employees, with or without back pay." 42 U.S.C. 2000e-16(b). At the same time, Congress imposed "certain preconditions," *Brown*, 425 U.S. at 832, on a federal employee's ability to file a civil action in federal district court on a claim of employment discrimination. See 42 U.S.C. 2000e-16(c). The employee first "must seek relief in the agency that has allegedly discriminated against him." *Brown*, 425 U.S. at 832. If the employee is dissatisfied with the agency's disposition of his claim, he may "seek further administrative review with the [EEOC]" or, alternatively, may "file suit in federal district court without appealing to the [EEOC]." *Ibid.* If the employee does appeal to the EEOC, but is dissatisfied with the EEOC's decision, he then may file suit in district court. *Ibid.* An employee also "may file a civil action if, after 180 days from the filing of the charge or the appeal, the agency or [the EEOC] has not taken final action." *Ibid.*

2. In 1991, Congress authorized awards of compensatory damages in an "action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964." Civil Rights Act of 1991, Pub. L. No. 102-166, Tit. I, § 102, 105 Stat. 1072 (codified at 42 U.S.C. 1981a(a)(1)). Section 717, 42

[2] All responsibility for enforcing equal opportunity in federal employment was transferred to the EEOC from the Civil Service Commission, Reorg. Plan No. 1 of 1978, § 3, 43 Fed. Reg. 19,807 (1978). See 42 U.S.C. 2000e-4 note (1994 & Supp. II 1996).

U.S.C. 2000e-16 (1994 & Supp. II 1996), is the provision of the Civil Rights Act of 1964 governing Title VII claims against the federal government, while Section 706, 42 U.S.C. 2000e-5, is the provision governing Title VII claims against other employers. Title VII had previously authorized only back pay and other equitable remedies. See 42 U.S.C. 2000e-5(g)(1).[3]

3. In 1992, respondent Michael Gibson, an accountant employed by the Department of Veterans Affairs (the VA), was denied a promotion. The position went to a woman instead. Gibson filed a complaint with the VA, alleging sex discrimination in violation of Title VII. He sought back pay and a transfer to another VA hospital. The VA issued a decision finding no discrimination. App., *infra*, 2a, 16a.

Gibson appealed the decision to the EEOC, which found that the VA had discriminated against Gibson. The EEOC ordered the VA to promote Gibson with back pay. App., *infra*, 2a-3a, 16a-17a.

4. Gibson filed suit in federal district court to compel the VA's compliance with the EEOC's order.[4] He

[3] The 1991 Act also authorized awards of punitive damages in Title VII actions against private employers, but not against "a government, government agency or political subdivision." 42 U.S.C. 1981a(b)(1).

[4] The VA had not acted within the period prescribed by the EEOC to promote Gibson and to calculate his back pay. The EEOC had directed that Gibson be promoted by December 6, 1995, but the VA did not actually promote him until December 23, 1995. The EEOC had directed that Gibson's back pay be calculated by January 5, 1996, and that Gibson be paid by March 5, 1996; in fact, the VA calculated Gibson's back pay on January 29, 1996, and paid him on February 22 and 24, 1996. Gibson filed this action in the district court on January 11, 1996. App., *infra*, 16a-17a.

also sought compensatory damages—which he had not sought at the administrative level—for alleged "humiliation, mental anguish and emotional distress." App., *infra*, 3a, 4a, 21a.

The district court dismissed those claims. The court determined that Gibson's claims for promotion and back pay were moot because the VA had by that time fully complied with the EEOC's order. App., *infra*, 21-22a, 26a. The court rejected Gibson's claim for compensatory damages on the ground that he had failed to exhaust his administrative remedies because he had not presented that claim to the VA and the EEOC. *Id.* at 20a-24a.[5]

5. The court of appeals reversed the dismissal of Gibson's claim for compensatory damages, reasoning that federal employees need not exhaust administrative remedies on such claims. App., *infra*, 5a-14a. The court noted that "exhaustion is not required if [an agency] 'lack[s] authority to grant the type of relief requested.'" *Id.* at 6a (quoting *McCarthy* v. *Madigan*, 503 U.S. 140, 148 (1992)). The court then concluded that the EEOC does not have the authority under Title VII to award compensatory damages against federal agencies. *Id.* at 9a-13a.

[5] The court also rejected Gibson's claims for front pay and a job transfer. App., *infra*, 24a-25a. The court reasoned that front pay is unwarranted where, as here, the claimant receives the promotion that he was previously denied. *Ibid.* And the court concluded that Gibson had "not even come close to establishing that he is entitled to the extraordinary remedy of a job transfer." *Id.* at 25a. The court did conclude that Gibson was entitled to an award of attorneys' fees, because the VA had not fully complied with the EEOC's order by the time that the suit was filed. *Id.* at 26a-27a.

The court of appeals acknowledged that "[n]othing in the statute or regulations explicitly rules out" the EEOC's awarding compensatory damages on federal employees' claims under Title VII. App., *infra*, 6a. The court also acknowledged that "[i]t is not unreasonable to conclude" that the EEOC's statutory mandate to adjudicate Title VII claims against federal agencies "might be broad enough to allow the EEOC to award compensation for mental anguish and emotional distress." *Id.* at 7a. And the court noted that the Fifth Circuit had recently held that Congress authorized the EEOC to award compensatory damages on Title VII claims arising in the federal sector. *Ibid.* (citing *Fitzgerald* v. *Secretary, U.S. Dep't of Veterans Affairs*, 121 F.3d 203, 207 (1997)). The court nonetheless held that several factors compelled a contrary conclusion.

The court of appeals principally relied on 42 U.S.C. 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory * * * damages under this section," then "any party may demand a trial by jury." See App., *infra*, 9a-10a. A "trial by jury" cannot, of course, occur in an EEOC administrative proceeding. The court recognized that Section 1981a(c)(1) might be construed to mean that "the EEOC has the right to issue compensatory damages in the first instance, and the losing party may seek de novo review of the damages by demanding a jury trial" in district court. *Id.* at 9a. But the court rejected that construction. The court noted that a federal agency is bound by the EEOC's disposition of a Title VII complaint, although a claimant is not so bound and may seek relief de novo in district court. *Id.* at 9a-10a. A federal agency thus could not demand a jury trial to review an EEOC award of compensatory

damages to a claimant. The court consequently declined to construe Title VII in a manner that would deprive federal agencies of what the court characterized as the "significant procedural right" to a jury trial on compensatory damages claims. *Id.* at 10a.

The court of appeals found further support for its position in the language of 42 U.S.C. 1981a(a)(1) providing for compensatory damages awards only in "an action brought by a complaining party" under, *inter alia*, the statutory provision allowing Title VII claims against the federal government. App., *infra*, 10a. The court declined to defer to the EEOC's construction of Section 1981a(a)(1) as encompassing administrative as well as judicial proceedings. *Id.* at 7a-9a. The court concluded that Congress generally used the term "actions" in Title VII to refer to "civil actions filed in federal court, not complaints of discrimination lodged with the EEOC." *Id.* at 11a.

Finally, the court of appeals invoked the principle that any waiver of the federal government's sovereign immunity should be strictly construed. App., *infra*, 12a (citing *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981)). The court recognized that Congress has expressly waived the government's sovereign immunity with respect to civil actions for compensatory damages under Title VII. *Id.* at 11a-12a. But the court declined in the absence of a clearer expression of congressional intent "to extend the waiver of sovereign immunity so that the government may be liable for compensatory damages without the benefit of a jury trial." *Id.* at 12a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit held in this case that the EEOC has no authority to award compensatory damages against agencies of the federal government for violations of Title VII of the Civil Rights Act of 1964. The Seventh Circuit's decision squarely conflicts with a recent decision of the Fifth Circuit, which held that the EEOC may award compensatory damages on Title VII claims against federal agencies, and with the EEOC's own decisions construing its authority. As the Fifth Circuit recognized, Congress vested the EEOC with broad authority to enforce Title VII in the federal sector, including the authority to provide "appropriate remedies" to federal employees who are victims of employment discrimination. 42 U.S.C. 2000e-16(b). And Congress has made clear that the appropriate remedies for violations of Title VII by the federal government include compensatory damages. 42 U.S.C. 1981a(a)(1).

In holding that federal employees may recover compensatory damages under Title VII only in civil actions in federal district court, and not in EEOC proceedings, the Seventh Circuit has undermined the administrative exhaustion requirement of 42 U.S.C. 2000e-16(c) and imposed burdens on federal employees, federal agencies, and the federal courts that Congress could not have intended. It makes no sense to require federal employees to pursue administrative remedies in order to obtain equitable relief, including back pay, but to require them to go to court in order to obtain compensatory damages for the same acts of discrimination. This Court's review is necessary to clarify the law in this area, so that the extent of a federal employee's obligation to exhaust administrative remedies on his Title VII claims does not vary from circuit to circuit, and to ensure that the resolution of such claims does not become unduly costly, cumbersome, and time-consuming.

1. Although Congress has not stated, in so many words, that the EEOC may award compensatory damages on Title VII claims against agencies of the federal government, the EEOC's authority to do so is evident from the text and structure of Title VII. Cf. App., *infra*, 6a (acknowledging that "[n]othing in the statute or regulations explicitly rules out the idea").

Congress has delegated to the EEOC "full authority to enforce" Title VII against the federal government "through appropriate remedies, including reinstatement or hiring of employees, with or without back pay." *Brown* v. *General Services Admin.*, 425 U.S. 820, 831-832 (1976) (quoting 42 U.S.C. 2000e-16(b)). Congress has further authorized the EEOC to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities" to ensure that the federal workforce is "made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a) and (b) (Supp. II 1996). Congress thus did not specify the particular remedies that the EEOC may, and may not, award against federal agencies. Congress instead vested the EEOC with broad discretion to determine which remedies, among those authorized by law, are "appropriate" based upon its expertise with regard to employment discrimination generally and in the federal workplace specifically. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created . . . program

necessarily requires * * * the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)).

In 1991, Congress added compensatory damages to the array of remedies available under Title VII against federal agencies as well as other employers. Civil Rights Act of 1991, Pub. L. No. 102-166, Tit. I, § 102, 105 Stat. 1072 (codified at 42 U.S.C. 1981a(a)(1)) (authorizing compensatory damages in any "action brought by a complaining party under section * * * 717 of the Civil Rights Act of 1964"—the provision that extended Title VII to the federal government—"against a respondent who engaged in unlawful intentional discrimination"). Nowhere did Congress expressly limit the EEOC's authority to award such damages against federal agencies. It thus follows that the EEOC possesses the authority to award compensatory damages as an "appropriate remed[y]" under Title VII.

The EEOC has maintained since 1992 that compensatory damages are among the remedies that it may award on Title VII claims against federal agencies. See *Jackson* v. *United States Postal Service*, EEOC Appeal No. 01923399 (Nov. 12, 1992), slip op. 407. The EEOC's position is based, in part, on its view that the 1991 legislation, in authorizing compensatory damages in Title VII "action[s]" against federal agencies, refers to administrative as well as judicial proceedings. In upholding the EEOC's authority to award compensatory damages, the Fifth Circuit concluded that, whether or not administrative proceedings are "actions," Congress, by making compensatory damages available in judicial proceedings, gave the EEOC the authority to award the same relief in administrative proceedings. See *Fitzgerald* v. *Secretary, U.S. Dep't of Veterans Affairs*, 121 F.3d 203, 207 (1997) (relying on EEOC's "wide-ranging authority to enforce the anti-discrimination provisions of [Title VII]"). There is no reason to suppose, as did the Seventh Circuit (App., *infra*, 11a), that by authorizing the award of compensatory damages in Title VII "actions," Congress meant to deny the EEOC the authority to award such damages.

2. Congress's clear design in Title VII to encourage the resolution of employment discrimination claims against federal agencies at the administrative level, see 42 U.S.C. 2000e-16(c), would be undermined if the EEOC did not have the authority to resolve such claims fully through awards of compensatory damages as well as other "appropriate remedies." Under Section 2000e-16(c), an employee must first present his Title VII claim to the agency that allegedly discriminated against him. If the employee does not obtain full relief from the agency, he may either appeal to the EEOC or file suit in federal district court. (He may also go to district court if his EEOC appeal is unsuccessful.) Section 2000e-16(c) serves the salutary purpose of enabling Title VII claims to be resolved at the administrative level, without all of the expense, delay, and disruption associated with litigating such claims in court. See, *e.g.*, *Tolbert* v. *United States*, 916 F.2d 245, 249 n.1 (5th Cir. 1990); *Nordell* v. *Heckler*, 749 F.2d 47, 49 (D.C. Cir. 1984); *Jordan* v. *United States*, 522 F.2d 1128, 1132 (8th Cir. 1974); see generally *McKart* v. *United States*, 395 U.S. 185, 195 (1969) (noting that administrative exhaustion requirements serve "very practical notions of judicial efficiency," because "the courts may never have to intervene" if a complainant is "successful in vindicating his rights in the administrative process").

Under the Seventh Circuit's decision, although a federal employee still must exhaust administrative remedies with respect to a claim under Title VII for equitable relief, including back pay, the employee need not also exhaust administrative remedies with respect to a claim for compensatory damages based on the same underlying acts of discrimination. According to the Seventh Circuit, because the EEOC does not have the authority to award compensatory damages, the employee need not present any claim for compensatory damages to the EEOC. And, while the Seventh Circuit did not expressly address whether the employee need present a compensatory damages claim to his own agency in the first instance, its rationale suggests that the employee may not have to present such a claim to the agency either. In holding that respondent did not violate the administrative exhaustion requirement of Section 2000e-16(c) when he failed to raise his compensatory damages claim before either the VA or the EEOC, the Seventh Circuit apparently reasoned that the VA, like the EEOC, could not award such damages and, consequently, that respondent was not required to seek them at either stage of the administrative process. Respondent thus was permitted to assert his compensatory damages claim for the first time in a civil action in federal district court.

The procedure authorized by the Seventh Circuit would, as the Fifth Circuit recognized in *Fitzgerald*, "be antithetical to the exhaustion requirement" of Section 2000e-16(c). 121 F.3d at 207 (concluding that compensatory damages claims must be presented to both the agency and the EEOC). A claimant "would be encouraged either to intentionally bypass the administrative process and go straight to district

court or perfunctorily go through the administrative process and then seek judicial review to obtain full relief." *Ibid.* (internal quotation marks omitted). The costs to the government and to claimants of fully resolving Title VII claims would thereby be increased significantly. And the workload of the federal courts would be further expanded. Cf. *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 56 (1993) (noting the already "congested civil dockets in federal courts").

According to the EEOC, 26,410 administrative complaints of employment discrimination were filed against federal agencies in fiscal year 1996. See EEOC, *Federal Sector Report of EEO Complaints Processing and Appeals by Federal Agencies for Fiscal Year 1996*, at 1.[6] Such complaints often seek compensatory damages as well as equitable relief. The majority of such claims are resolved at the agency level, without an appeal to the EEOC or a civil action in federal district court. In fiscal 1996, however, the EEOC closed 4,537 appeals of cases raising claims under Title VII, often ordering corrective action, including awards of compensatory damages. *Id.* at 74; see also, *e.g.*, *Turner* v. *Babbitt*, No. 1956390, 1998 WL 223578, at *5-6 (EEOC Apr. 27, 1998) (citing recent administrative appeals in which the EEOC awarded compensatory damages). If the EEOC does not have the authority to award compensatory damages against federal agencies, as the Seventh Circuit held, many such cases could not be closed at the

[6] The number includes not only claims of discrimination on the basis of race, color, religion, sex, or national origin, within the scope of Title VII, but also claims of discrimination on the basis of age and disability.

administrative level and instead would reach the federal courts.[7] And if, as the rationale of the Seventh Circuit's decision might suggest, federal agencies likewise cannot award compensatory damages at the first stage of the administrative process, the burden on the federal courts would be still greater.

3. The Seventh Circuit's decision rests primarily on 42 U.S.C. 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory * * * damages under this section," then "any party may demand a trial by jury." The court reasoned that, if the EEOC could award compensatory damages against federal agencies, the agencies would be deprived of that statutory right to a jury trial, because agencies are bound by the EEOC's dispositions of Title VII claims. App., *infra*, 10a; see 42 U.S.C. 2000e-16(c) (providing for civil actions only by "an employee or applicant for employment" who does not prevail at the administrative level); 29 C.F.R. 1614.504(a) (1996).

Congress could reasonably have determined, however, that the interests of federal agencies as employers would be adequately served when compensatory damages were awarded by the EEOC rather than a jury. Congress does not appear to have viewed Section 1981a(c)(1), as did the Seventh Circuit (App., *infra*, 10a), as providing "a significant procedural right" for employers. To the contrary, to the extent that members of Congress addressed the jury trial

[7] The EEOC has calculated that 768 of the appeals that it received from federal employees in fiscal 1996 originated in the States of the Seventh Circuit. Even if only some of those employees had chosen to bypass the EEOC and to go directly to district court, the impact on the judicial workload in the Seventh Circuit could have been significant.

provision during their consideration of the Civil Rights Act of 1991, they portrayed the provision as a benefit to employees and a detriment to employers.[8] The House Report specifically addressed concerns that juries would award disproportionately high damages in Title VII cases. See H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 72 (1991) (noting that jury discretion would be constrained by statutory damages caps, by allowing damages only in cases of

[8] See, *e.g.*, 137 Cong. Rec. 29,053-29,054 (1991) (statement of Sen. Wallop) (expressing concern that jury awards in Title VII cases would have an "economically devastating" impact on employers); *id.* at 29,051 (statement of Sen. Leahy) (noting that "[f]or the first time, women and the disabled could recover damages and have jury trials for claims of intentional discrimination" as a result of the legislation); *id.* at 29,041 (statement of Sen. Bumpers) (acknowledging employers' concerns about "being exposed to a runaway jury"); *id.* at 29,030 (statement of Sen. Symms) (asserting that "huge monetary award amounts are encouraged through jury trials"); *id.* at 29,022 (statement of Sen. Wirth) (stating that legislation "laid aside the misguided idea of denying women from having a jury determine whether or not they have been wronged"); *id.* at 28,926 (statement of Sen. Heflin) (describing provision as "allow[ing] jury trials for victims of sexual bias").

See also, *e.g.*, 137 Cong. Rec. 30,690 (1991) (statement of Rep. Dixon) (describing provision as "permit[ting] jury trials for victims of bias"); *id.* at 30,677 (statement of Rep. Hyde) (expressing concern that provision would operate to the detriment of employers); *id.* at 30,668 (statement of Rep. Ford) (describing provision as "provid[ing] all victims of intentional discrimination a right to trial by jury"); *id.* at 30,644 (statement of Rep. Doolittle) (describing various provisions of legislation, including "jury trials" provision, as creating "a tremendous injustice and burden to any employer").

All of those quoted, other than Senators Wallop and Symms and Representative Doolittle, voted in favor of the legislation.

intentional discrimination, and by the "additional check" provided by judges). No similar concerns were expressed that juries might, out of sympathy for employers, award disproportionately low damages in Title VII cases. Congress could thus have concluded that federal agencies did not need, and would not want, a jury trial right on all claims for compensatory damages under Title VII—a right that would preclude many such claims from being fully resolved at the administrative level without resort to the courts. Congress could instead have decided that the EEOC, with its expertise in adjudicating Title VII claims in the federal sector, provides agencies sufficient protection against unwarranted damages claims.[9]

The Seventh Circuit also rested its decision on the view that Congress did not specifically waive the United States' sovereign immunity from compensatory damages awards by the EEOC. App., *infra*, 11a-12a. But the court offered no authority for the proposition that a waiver of sovereign immunity with respect to judicial proceedings—which the court conceded had occurred (*ibid.*)—does not encompass a waiver of sovereign immunity with respect to administrative proceedings before an agency of the same sovereign.[10] In any event, as explained above, Congress indicated with sufficient clarity its intent that the EEOC be able to award compensatory dam-

[9] To be sure, where a claimant files a civil action against a federal agency after failing to prevail on a claim for compensatory damages at the administrative level, the agency, like the claimant, has the right to demand a jury trial under Section 1981a(c)(1).

[10] All of the cases relied on by the Seventh Circuit involved the question whether the United States had waived its immunity to suit in court. See App., *infra*, 12a-13a.

ages on Title VII claims against agencies of the federal government. See 42 U.S.C. 2000e-16(b) (authorizing EEOC to award "appropriate remedies" against federal agencies that violate Title VII); 42 U.S.C. 1981a(a)(1) (recognizing that compensatory damages are an appropriate remedy for Title VII violations by federal agencies).

4. The Seventh Circuit acknowledged (App., *infra*, 9a-10a, 13a-14a) that its decision in this case conflicts squarely with the Fifth Circuit's decision in *Fitzgerald*, which concluded that the EEOC's "wide-ranging authority to enforce the anti-discrimination provisions of [Title VII]" against federal agencies includes the authority to award compensatory damages. 121 F.3d at 207. The Fifth Circuit specifically noted the EEOC's statutory authority to grant "appropriate remedies, including reinstatement or hiring of employees with or without back pay," and to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." *Ibid.* (quoting 42 U.S.C. 2000e-16(b)). The court concluded that "this mandate, as described in § 2000e-16(b), is sufficiently broad to allow the EEOC to offer * * * compensatory damages." *Ibid.*[11]

[11] The Seventh Circuit suggested that the Fifth Circuit might have reached a different conclusion in *Fitzgerald* had it considered the jury trial provision of Section 1981a(c)(1). App., *infra*, 10a. The Fifth Circuit did not, to be sure, specifically address Section 1981a(c)(1). But that does not necessarily mean that the Fifth Circuit was unaware of that provision—which is, after all, a subsection of Section 1981a, with which *Fitzgerald* displayed considerable familiarity—much less that the Fifth Circuit would have viewed the provision as dispositive of the question presented here. The Fifth Circuit may simply have

No other court of appeals has yet decided whether the EEOC has the authority to award compensatory damages against federal agencies for violations of Title VII. The Eleventh Circuit, however, recently requested supplemental briefing on that issue in a case that remains pending in that court.[12]

No purpose would be served by allowing the issue to percolate any longer in the courts of appeals. The opposing positions are thoroughly developed in the opinions of the Fifth and Seventh Circuits. The conflict is already creating considerable uncertainty for the EEOC, as well as other federal agencies,[13] with

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recognized—correctly, in our view—that Section 1981a(c)(1) has no relevance to the availability of compensatory damages in administrative proceedings.

[12] See Memorandum from Deputy Clerk of the 11th Circuit to Counsel or Parties in *Crawford* v. *Babbitt*, No. 97-8299 (11th Cir. Apr. 24, 1998) (requesting briefs on "the question of whether this Court should adopt the reasoning and holding in *Gibson* v. *Brown*, 137 F.3d 992 (7th Cir. 1998), and, if so, what effect it will have on the issues raised in this case"); see also *McAdams* v. *Reno*, 858 F. Supp. 945, 951 (D. Minn. 1994) (concluding that "compensatory damages are available to federal sector complainants in administrative proceedings" for violations of Title VII), aff'd on other grounds, 64 F.3d 1137 (8th Cir. 1995).

[13] The Merit Systems Protection Board (MSPB), for example, previously concluded, in reliance on the EEOC's decision in *Jackson*, *supra*, that the MSPB may award compensatory damages against federal agencies in administrative appeals of so-called "mixed cases" (*i.e.*, cases challenging significant adverse employment actions by federal agencies as having been motivated by "discrimination on the basis of race, color, religion, sex, national origin, handicap, or age," 29 C.F.R. 1614.302(a)(2) (1996)). See *Hocker* v. *Department of Transportation*, 63 M.S.P.R. 497, 505 (1994), aff'd, 64 F.3d 676 (Fed. Cir. 1995), cert. denied, 516 U.S. 1116 (1996). Under the rationale

regard to their authority to award compensatory damages in the thousands of administrative cases that arise annually under Title VII. A prompt resolution of the conflict would serve the interests of the federal government, as employer, and of federal employees by clarifying the process for asserting compensatory damages claims against federal agencies for violations of Title VII.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1998

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of the Seventh Circuit's decision, the MSPB, like the EEOC, would lack such authority.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-3776

MICHAEL GIBSON, PLAINTIFF-APPELLANT

v.

JESSE BROWN, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, DEFENDANT-APPELLEE

[Argued: Sept. 24, 1997
Decided March 3, 1998
Rehearing and Suggestion for Rehearing
En Banc Denied May 7, 1998]

Before: RIPPLE, MANION and KANNE, Circuit Judges.

MANION, Circuit Judge.

Michael Gibson, a career federal employee at the Department of Veterans Affairs, experienced sex discrimination in 1992 when he applied to be a supervisory accountant at his supply depot but was turned down by his two female supervisors. The EEOC ordered Gibson's promotion (and backpay), but Gibson filed suit in the district court when the VA was slow to comply. By the time the district court ruled on his suit, the VA had implemented most of the Commission's order, making the complaint largely moot. But

Gibson's claim for compensatory damages remained. The court dismissed that claim after concluding that Gibson never asked the EEOC to compensate him for the VA's discrimination. We reverse.

I.

In 1988 Michael Gibson began his career working for the VA as an accountant in the agency's Albuquerque, New Mexico facility. He transferred in 1990 to the VA supply depot in Hines, Illinois, where he later applied for a promotion to become a supervisory accountant (at the time, he was a GS-9 accountant). He did not get the promotion, and when Gibson's two female supervisors selected a woman for the position instead of him, Gibson filed a timely Title VII claim alleging sex discrimination. In July 1993, about a year after he had filed his claim, the VA issued its final agency decision finding no discrimination. Gibson appealed to the EEOC. In October 1995, the Commission reversed the VA, finding that the VA had indeed discriminated against Gibson in the promotion decision.

In the federal domain the EEOC's final determinations of discrimination are binding against government agencies unless the complainant himself seeks de novo review of that finding in federal court. *See* 29 C.F.R. § 1614.504(a) ("A final decision that has not been the subject of an appeal or civil action [by the complainant] shall be binding on the agency."); *Morris v. Rice*, 985 F.2d 143, 145 (4th Cir. 1993) ("[Congress] provided that final decisions of the EEOC were to be binding on federal agencies."). Accordingly, along with the parties we acknowledge that the VA discriminated against Gibson when his supervisors chose a less experienced woman to be the

supervisory accountant at Gibson's supply depot. The Commission also provided a remedy for the discrimination: it ordered the VA to promote Gibson and issue him backpay. The VA did these things, but reluctantly (a month late), prompting Gibson to file a federal complaint in district court seeking compliance with the Commission's nonappealable order. *See* 29 C.F.R. § 1614.408(a).

In the district court, Gibson asked for much of the relief that the VA belatedly gave him, which meant that for the most part his complaint was moot by the time the VA moved to dismiss it. But Gibson's claim for compensatory damages remained—specifically, he asked for compensatory damages relating to mental anguish and emotional distress resulting from the VA's discrimination (and experienced over the ensuing three years, during which Gibson was forced to work for the same supervisor who discriminated against him[1]). The district court interpreted the claim for compensatory damages as an entirely new claim of discrimination, and then dismissed it because Gibson did not present it in the first instance to the EEOC (or, in administrative law parlance, because Gibson had failed to exhaust his administrative remedies). The district court added that even if it interpreted the new claim as one seeking only relief (as we interpret it), *viz.* compensatory damages, the same rule of exhaustion would apply and require its dismissal.

Apparently the district court interpreted Gibson's claim for compensatory damages (as Gibson phrased

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[1] We express no opinion as to whether the working environment described by Gibson is worthy of compensatory damages.

it, damages for the "humiliation, mental anguish and emotional distress" caused by the VA's discrimination) as a claim for retaliation or postdiscriminatory harassment. Gibson does complain that he was forced to work for three years (from 1992-95, while the appeals were pending) for the same supervisor who had discriminated against him, but we do not interpret this as a new claim of discrimination. Under the Civil Rights Act of 1991, claims for compensatory damages are claims for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." See § 1981a(b)(3). Gibson asks for exactly these damages (even repeating the statute's language concerning "mental anguish"). Accordingly, we will treat his claim as one seeking recovery for the VA's discrimination rather than a brand new claim of discrimination.[2] As far as the government is concerned, the distinction ultimately makes no difference—whether Gibson raises a new instance of discrimination or a new demand for relief, it is barred because Gibson never presented it to the EEOC. Having determined that Gibson's complaint is a claim for damages—not a new claim of discrimination—we are left to decide whether the government correctly argues that it is barred anyway.

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[2] Even if we had interpreted Gibson's claim to be one of retaliation (for bringing his discrimination charge), we might not have agreed with the district court that Gibson was required to file a new charge of discrimination with the EEOC. A complainant need not file a new charge of discrimination to complain that the defendant retaliated against him for filing the first charge. *See McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 482 (7th Cir.1996). "In such cases, only a single filing [is] necessary to comply with the intent of Title VII." *Id.*

II.

There is some dispute over whether Gibson asked the EEOC for compensatory damages. If he did, then the government's failure-to-exhaust argument obviously is a non-starter. But both parties agree that Gibson never asked to be compensated for emotional distress, or humiliation, nor did he invoke any other term typically associated with a demand for compensatory damages. (At one point, Gibson did instruct the EEOC investigator that he would settle his case for a "monetary cash award"; the relief ordered by the EEOC included backpay.) It would be simpler if we could say that Gibson put the EEOC on notice that he was seeking compensatory damages (as opposed to, say, backpay, which is considered equitable relief, § 1981a(b)(2)), but the record does not support it. Accordingly, we must now decide whether his failure to exhaust administrative remedies with respect to compensatory damages means he could not later obtain these damages from the district court.

Ordinarily, a failure to exhaust administrative remedies on an issue means that the complainant may not press his claim in federal court. *McCarthy v. Madigan*, 503 U.S. 140, 144-45, 112 S. Ct. 1081, 1085-87, 117 L.Ed.2d 291 (1992). Exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Id.* at 145, 112 S. Ct. at 1086. But it could go without saying that a party is not required to seek relief from an administrative agency (before seeking it from a federal court) if the agency does not have the power to redress a claim in the way the complainant requests. *Id.* at 148, 112 S. Ct. at 1088. In other words, while an administrative agency may be "competent to adjudi-

cate the issue presented," (here, Gibson's claim of discrimination), exhaustion is not required if it "lack[s] authority to grant the type of relief requested" (in this case, money damages). *Id., citing McNeese v. Board of Ed. for Community Unit School Dist. 187*, 373 U.S. 668, 675, 83 S. Ct. 1433, 1437-38, 10 L. Ed. 2d 622 (1963) (students seeking to integrate public school need not file complaint with school superintendent because the "Superintendent himself apparently has no power to order corrective action" except to request the Attorney General to bring suit); *Montana Nat'l Bk. of Billings v. Yellowstone County*, 276 U.S. 499, 505, 48 S. Ct. 331, 333, 72 L. Ed. 673 (1928) (taxpayer seeking refund not required to exhaust where "any such application [would have been] utterly futile since the county board of equalization was powerless to grant any appropriate relief").

In this case, Gibson says that while the EEOC can adjudicate the merits of his discrimination claim, and even provide equitable relief such as backpay and a promotion (both of which it ordered in his case), asking the EEOC to issue compensatory damages would be asking it to do what it has no authority to do. (Nothing in the statute or regulations explicitly rules out the idea, though the only payments mentioned in the regulations relate to "loss of earnings"—presumably backpay—caused by the federal agency's discrimination. *See* 29 C.F.R. § 1614.501(a).)

On the one hand it sounds logical that the EEOC can issue compensatory damages. After all, the agency was created by Congress not only to investigate complaints of discrimination, but, in the federal sector, to adjudicate them. And more than this, in the federal sector, Congress empowered the EEOC to

enforce Title VII's antidiscrimination provisions by issuing "such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities." 42 U.S.C. § 2000e-16(b). It is not unreasonable to conclude that this mandate might be broad enough to allow the EEOC to award compensation for mental anguish and emotional distress, much like the damages Gibson seeks in this case. Indeed, the Fifth Circuit cited this statutory language in concluding that Congress intended the EEOC to redress discrimination by any means necessary, including by issuing awards of compensatory damages; the court punctuated its determination by noting that the statute already allows the Commission to issue back pay, "which is a form of compensatory damages." *Fitzgerald v. Secretary, Veterans Affairs*, 121 F.3d 203, 207 (5th Cir. 1997). The Fifth Circuit certainly was correct to turn first to the language of Title VII to determine the scope of the EEOC's binding adjudicative powers, though we note its misstep in referring to backpay as a subset of compensatory damages. The Civil Rights Act of 1991 (governing awards for compensatory damages under Title VII) plainly states that they are distinct remedies. *See* 42 U.S.C. § 1981a(b)(2) ("Compensatory damages . . . shall not include backpay").

Fitzgerald places some emphasis on the EEOC's conclusion that the agency can issue awards for compensatory damages; the EEOC reached that determination through its adjudicative rather than rulemaking authority. The EEOC is free to choose that route to announce new principles (even a principle as significant as the one at play in this case), *see SEC v. Chenery Corp.*, 332 U.S. 194, 202, 67 S. Ct. 1575, 1580,

91 L. Ed. 1995 (1947), but the availability of its rule-making powers means that "it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct." *Id.* Instead, the "function of filling in the interstices of regulatory statutes should be performed, as much as possible, though [the] quasi-legislative promulgation of rules to be applied in the future." *Id.* Even allowing some measure of deference to the EEOC's position, we note that the decisions themselves contain no particularly persuasive reasons why the agency should be allowed to issue compensatory damages, other than the reasons already noted by *Fitzgerald* itself. It appears that *Fitzgerald* cites these agency decisions (at least six of them) in order to give them deference, not because it finds them in any way convincing.

We have no difficulty in affording the EEOC a measure of deference—even when interpreting its own powers under a statutory scheme—so long as the interpretation is consistent with the plain language of the statute. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257-58, 111 S. Ct. 1227, 1235-36, 113 L. Ed. 2d 274 (1991) (rejecting EEOC's interpretation that Title VII applies extraterritorially because it "lack[ed] support in the plain language of the statute"). The section of Title VII pertaining to the federal sector, 42 U.S.C. § 2000e-16, is silent on the issue of compensatory damages, which makes sense because they were not even available in Title VII suits until Congress passed the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Section 1981a mentions compensatory damages in several places: in announcing their availability in "an action brought by a complaining party" (§ 1981a(a)(1)), in excluding backpay from

them (§ 1981a(b)(2)), in limiting their amount (§ 1981a(b)(3)), and, finally, in legislating that "[i]f a complaining party seeks compensatory or punitive damages . . . (1) any party may demand a trial by jury" (§ 1981a(c)). It is this last provision of the statute that is not discussed in *Fitzgerald* or, for that matter, in any of the EEOC decisions relied upon in *Fitzgerald*.

We cannot sidestep it. Our reading persuades us that it means what it says: if the complaining party (defined by § 1981a(d) as someone capable of suing in the first place) seeks compensatory damages, either party, including the defendant government agency, may demand a jury trial on the issue. Of course the EEOC does not provide jury trials; they are obtained in federal district court. *See* § 1981a(c)(2) ("the court shall not inform the jury of the limitations [on compensatory damages] described in subsection (b)(3) of this section"). Perhaps we could say that the EEOC has the right to issue compensatory damages in the first instance, and the losing party may seek de novo review of the damages by demanding a jury trial. Not only would that be expensively duplicative, but it also probably would violate the rule that the EEOC's final determinations are binding against the agency (and thus are nonappealable). *See* 29 C.F.R. 1614.504(a). So we are left with this: if the EEOC issues compensatory damages, they necessarily are binding against the employing agency, meaning that the agency is deprived under the statute of its right to a jury trial. We agree with Gibson that the statutory scheme promulgated by Congress does not allow the EEOC to issue what would be nonappealable awards for compensatory damages; compensatory

damages are awarded within the jury system established by the statute.

We part company with *Fitzgerald* in reaching this conclusion for several reasons. Most important of these is the statutory language that *Fitzgerald* does not cite—the right of the complainant or the government agency to demand a jury trial under § 1981a(c) if the complaining party seeks compensatory damages. Under *Fitzgerald's* approach (and for that matter the EEOC's), the right to a jury trial under that section is lost. If we are to give effect to each section or provision in a statute, *United States v. Franz*, 886 F.2d 973, 978 (7th Cir.1989), it follows that we are particularly reluctant to interpret a statute in a way that altogether strikes a provision and a significant procedural right provided by it. It is quite possible that the *Fitzgerald* court never discusses the jury trial issue because the parties never raised it, thereby never alerting the court that the right to a jury trial conferred by § 1981a compels the conclusion we make today. Indeed, had the Fifth Circuit benefitted from as full a briefing on the issue as we have before us, it might well have reached a different conclusion.

In addition to the statutory language conferring a right to a jury trial, we note that the statute allows compensatory damages only "[i]n an *action* brought by a complaining party" under section 717 (the part of Title VII allowing federal employees to sue the government for discrimination, 42 U.S.C. § 2000e-16). See 42 U.S.C. § 1981a(a)(1) (emphasis added). Is an action a federal suit in district court, an EEOC proceeding, or both? Congress has demonstrated that it knows the difference between a civil action and an

administrative proceeding—in fact, it distinguishes between the two in the statute. *See* 42 U.S.C. § 1981a(d)(1)(A) (defining complaining party as "a person who may bring *an action or proceeding* under Title VII") (emphasis added).

Indeed, throughout the statutory scheme, Congress makes it clear that "actions" are civil actions pursued in courts, not administrative agencies. Section 706 of Title VII (the part applying to the private sector) tells us that the *United States district courts*—not the EEOC or any other administrative agency—"have jurisdiction of *actions* brought under [Title VII]." *See* 42 U.S.C. § 2000e-5(f)(3). The same holds true in federal sector suits like Gibson's. *See* § 717 of Title VII, 42 U.S.C. § 2000e-16 ("civil actions" against the government are to be pursued exactly "as provided" in section 706). Thus, when Congress uses the term "action" in Title VII, it is speaking of civil actions filed in federal court, not complaints of discrimination lodged with the EEOC. In enacting the Civil Rights Act of 1991, Congress could have chosen a more expansive term than "action" or even redefined "action" to include EEOC proceedings, but it did not.[3]

One additional factor persuades us that a government agency may not be held liable for compensatory damages without the benefit of a jury trial. By its terms, Title VII constitutes a waiver of sovereign immunity because it allows the government to be

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[3] In addition to the statute, the Regulations distinguish between civil actions (filed in court) and complaints (filed with administrative agencies) by allowing a complainant "who has filed an individual complaint" to file a "civil action in an appropriate United States District Court" within 90 days of a final agency decision. *See* 29 C.F.R. § 1614.408(a).

sued, *Irwin v. Department of Veterans' Affairs*, 498 U.S. 89, 94-95, 111 S. Ct. 453, 456-57, 112 L. Ed. 2d 435 (1990); the Civil Rights Act of 1991 extends that waiver by allowing the government to be sued for compensatory damages. But unless Congress tells us otherwise, we cannot further extend that waiver by allowing the government to be liable for compensatory damages at the administrative level (and without the benefit of a jury trial). *See id.* at 95, 111 S. Ct. at 457 (interpreting the very same provisions of Title VII—allowing suits against the government—and noting that "[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed.").

As we have discussed, we think the government's statutory right to a jury trial is a clear expression by Congress that it has limited its waiver of sovereign immunity. If Congress wishes to extend the waiver of sovereign immunity so that the government may be liable for compensatory damages without the benefit of a jury trial, it is free to say so unequivocally. What the government asks us to do in this case is read an extension of the waiver into Title VII, for good reason something we should not do. The Supreme Court has instructed that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S. Ct. 2698, 2701, 69 L. Ed. 2d 548 (1981). In other words, a court has no business tinkering with elaborate statutory machinery like Title VII to find a waiver of sovereign immunity; the Government's consent to be sued must be interpreted, "in terms of its scope, in favor of the sovereign," *Lane v. Pena*, 518 U.S. 187, ——, 116 S. Ct. 2092, 2096, 135 L. Ed. 2d 486

(1996), and not "enlarged . . . beyond what the [statutory] language requires." *United States v. Nordic Village Inc.*, 503 U.S. 30, 34, 112 S. Ct. 1011, 1014-15, 117 L.Ed.2d 181 (1992). *See also United States v. Williams*, 514 U.S. 527, 531, 115 S. Ct. 1611, 1615-16, 131 L. Ed. 2d 608 (1995) (when confronted with a purported waiver of the Federal Government's sovereign immunity, the Court will "construe ambiguities in favor of immunity"). In this case, we would be doing more than tinkering—we would be redrafting (actually, reducing) the scope of sovereign immunity under the statute by allowing an administrative agency to issue nonappealable awards for compensatory damages, thereby wresting the matter from district courts and juries. That would not be consistent with our role, or with the statute Congress wrote.

III.

In concluding that the EEOC may not order the government to pay compensatory damages, we recognize the EEOC's responsibility to issue any orders it deems "necessary and appropriate." We are not displacing any right that the EEOC historically has enjoyed. We simply conclude that Congress has determined it is inappropriate for the EEOC to order the government to pay compensatory damages, a right which it never had in the first place. *Fitzgerald* concludes otherwise, but the statutory provisions at play convince us not to follow the Fifth Circuit's lead.[4] "Our duty is to independently decide our own

[4] Because of this disagreement, this opinion was circulated to the full court for a vote on whether to grant rehearing en banc in advance of decision. *See* Circuit Rule 40(e). There were no votes to grant rehearing.

cases, which sometimes results in disagreements with decisions of the other circuits." *Atchison, Topeka and Santa Fe Railroad Co. v. Pena*, 44 F.3d 437, 443 (7th Cir.1994) (en banc), *aff'd. sub nom. Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe Railroad Co.*, 516 U.S. 152, 116 S.Ct. 595, 133 L. Ed. 2d 535 (1996). In this case, that means Gibson should have been allowed to pursue his claim in the district court. We already have concluded that it was not a new claim of discrimination. It was a claim for compensatory damages relating to his employer's discrimination, and it was not redressable by the EEOC. We reverse the district court and remand Gibson's claim so that it may be tried to a jury, which is what he has demanded in his complaint and what the statute allows.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 96 C 223

MICHAEL GIBSON, PLAINTIFF

v.

JESSE BROWN, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, DEFENDANT

[Filed: Oct. 3, 1996]

MEMORANDUM OPINION AND ORDER

CASTILLO, District Judge.

Presently pending before the Court is defendant Jesse Brown's motion to dismiss plaintiff Michael Gibson's ("Gibson") amended complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendant Brown's motion alternatively seeks summary judgment. For the reasons that follow, defendant's motion is hereby granted in part and denied in part.

RELEVANT FACTS

Gibson is a federal employee with about 19 years of service credit with the Department of Veteran Affairs ("VA"). In 1992, Gibson complained of sex dis-

crimination in connection with his non-promotion to GS 11/12 Supervisory Accountant, a position that he claimed had been awarded to a less qualified female. Gibson's EEO Complaint described the issues in the following manner: "Non-selection for announcement 92-24 dated 2-28-92, instead announcement was reissued and given to an employee who did not qualify for bid 92-24, or selection of bid 92-41." (*See* Ex. 1, Plaintiff's Rule 12(m) Statement). When asked to specifically describe the basis of his complaint, Gibson stated: Selecting official stated that all applicants in the fiscal division for the position were very good. In fact I worked the position for several months, and felt I was in the right place at the right time with the right credentials, however a [sic] employee who did not qualify for bid 92-94 was selected. I can only conclude that preselection was made based on sex, all supervisors are now female. This type of discrimination should never be tolerated, however, when its aimed at a veteran, at the veteran's supply depot, words can't describe it. Veterans are why we have jobs. *Id.* Gibson specifically requested that the following corrective action be taken to rectify his complaint: "GS-11 backpay, transfer to VA Hines Hospital, or other hospital of my choice." *Id.*

After the Department of Veterans Affairs ("VA") found no discrimination, Gibson successfully appealed to the Equal Employment Opportunity Commission ("EEOC"). On October 6, 1995, the EEOC reversed the VA, finding that defendant discriminated against him based on sex, and that the VA's reasons for passing him over were pretextual. On November 6, 1995, the EEOC ordered defendant to promote plaintiff to the GS 11/12 Supervisory Accountant position

within 30 days. Defendant did not comply with this aspect of the EEOC order until December 23, 1995. The EEOC further ordered defendant to calculate plaintiff's backpay and interest within 60 days after the decision became final, and to pay plaintiff within 60 days thereafter. The defendant did not calculate Gibson's backpay and interest until January 29, 1996. Gibson was paid on February 22 and 24, 1996.

On January 11, 1996, Gibson filed this lawsuit seeking two kinds of relief. First, Gibson requested enforcement of those aspects of the EEOC decision with which defendant had not yet complied. (Complt. ¶¶ 9-16 and Exhibit A.) Second, Gibson sought the additional remedies of front pay, a declaration of his right to a transfer, a jury trial as to compensatory damages, and attorneys' fees incurred after October 6, 1995. (Complt. ¶¶ 9-11, 17-18 and Exhibit A.)

STANDARDS

The United States seeks the dismissal of this action based on a variety of documents outside the pleadings, and Gibson has opposed that effort in the same manner. However, this does not automatically warrant conversion of the motion to one for summary judgment, because the United States is asserting that the Court lacks jurisdiction over Gibson's claims. *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986); *Castor v. United States*, 883 F. Supp. 344, 348 (S.D. Ind. 1995). In this situation, the district court is entitled to receive appropriate evidentiary submissions—"any rational mode of inquiry will do." *Crawford*, 796 F.2d at 929. It must then decide the jurisdictional issue, not simply rule that there is or is not enough evidence to have a trial on the issue. "The

only exception is in instances when the jurisdictional issue is 'so bound up with the merits that a full trial on the merits may be necessary to resolve the issue.'" *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (*quoting Crawford*, 796 F.2d at 929). That exception is not triggered by the facts of this case. Accordingly, the Court will first decide jurisdictional issues based on all the materials the parties have submitted.

Since the United States seeks a case-dispositive outcome based on its motion, Gibson has been properly notified of the proper manner in which to contest the government's evidentiary materials and the consequences of failing to do so. *English v. Cowell*, 10 F.3d 434 (7th Cir. 1993). Gibson has been afforded "a full opportunity to present contradicting affidavits or materials in order to cure a jurisdictional or party defect not capable of being resolved on the words of the complaint." *Id.* at 437 (*citing Fountain v. Filson*, 336 U.S. 681, 69 S. Ct. 754, 93 L. Ed. 971 (1949)). Indeed, Gibson has submitted such materials to the court for its consideration in ruling on the instant motion. Given that Gibson has availed himself of the opportunity to submit materials outside the pleadings, to the extent the Court finds it has jurisdiction, it will treat defendant's motion as one for summary judgment.

ANALYSIS

To be heard in federal court, a plaintiff must first set forth an appropriate basis for jurisdiction. Gibson tries to rest the jurisdictional basis for this discrimination action on provisions of the Federal Tort Claims Act. He invokes the Act's provisions with

regard to his claims for compensatory and other money damages accruing since October 6, 1995, the day the EEOC reversed the VA's finding of no discrimination. However, Section 717 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, provides the exclusive remedy for claims of discrimination in federal employment. *Brown v. General Serv. Admin.*, 425 U.S. 820, 835 (1976). As such, it must govern jurisdiction. In *Brown*, the Supreme Court held that "[i]t would require suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme (of Section 717) to be circumvented through artful pleading." *Id.* at 832-33. The Seventh Circuit has rejected similar attempts to pend Bivens-styled constitutional claims onto Title VII actions. *Robbins v. Bentsen*, 41 F.3d 1195 (7th Cir. 1994). This Court must likewise reject plaintiff's attempts to plead any jurisdictional basis other than 42 U.S.C. § 2000e-16 in his complaint.

The Court finds other obstacles to exercising jurisdiction under the Federal Tort Claims Act. First, the Court has no jurisdiction to entertain tort claims against the United States where plaintiff has not first exhausted his administrative remedies under the Federal Tort Claims Act. 28 U.S.C. §§ 1346, 2671 *et. seq.*; *Erxleben v. United States*, 668 F.2d 268, 270 (7th Cir. 1981); *Best Bearings Co. v. United States*, 463 F.2d 1177, 1179 (7th Cir. 1972). Additionally, the VA is not a suable entity under the Federal Tort Claims Act, which permits suit only against the United States, not its agencies. 28 U.S.C. §§ 2679(a), (b)(1); *Finley v. United States*, 490 U.S. 545, 552-53 (1989); *Hughes v. United States*, 701 F.2d 56, 57 (7th Cir. 1982). Therefore, Gibson's failure to name the United

States as defendant in an FTCA suit also results in a fatal lack of jurisdiction. *Id.* Gibson's allegations that the Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346 are hereby dismissed with prejudice.[1]

The Court will therefore proceed to analyze Gibson's remaining claims pursuant to the statute appropriately governing this case, 42 U.S.C. § 2000e-16.

Plaintiff Is Barred From Raising Claims He Failed To Include In His EEOC Complaint

Title VII specifically requires a federal employee to exhaust his or her administrative remedies as a precondition to filing suit in federal court. *Robbins*, 41 F.3d at 1201-1203; *McGuinness v. United States Postal Serv.*, 744 F.2d 1318, 1319-20 (7th Cir. 1984) (citations omitted). The regulations under Title VII governing the administrative process require federal employees to bring complaints to the attention of the EEO counselor in the agency within 30 calendar days of the date of the alleged discriminatory event. 29 C.F.R. § 1613.214(a)(1)(i); *Wolfolk v. Rivera*, 729 F.2d 1114, 1116-17 (7th Cir. 1984). If the EEO counselor is unable to resolve the matter informally, the EEO counselor will issue the employee a notice of the right to file a formal complaint with the agency; the employee has 15 days after receipt of the notice to file a formal complaint. 29 C.F.R. § 1613.214(a)(1)(i). An employee has full rights to bring a reprisal action which can be consolidated with the underlying com-

[1] For the same reasons, this Court rejects Gibson's belated attempt to amend his jurisdictional allegation to include references to 28 U.S.C. § 1343 (statutory civil rights) and 28 U.S.C. § 1361 (mandamus).

plaint. 29 C.F.R. § 1613.262(b). The employee may bring an action in federal district court within 90 days of receiving notice of final action taken by the agency, or within 180 days of the date on which the formal complaint was filed if the agency failed to take action on the formal complaint. 42 U.S.C. § 2000e-16(c).

In his amended complaint, Gibson newly alleges the following facts:

> In addition to the wrongful deprivation of the promotion and backpay, Gibson has suffered and is continuing to suffer humiliation, mental anguish and emotional distress as a direct and proximate result of the VA's intentional and unlawful discrimination. Gibson worked for three years under a supervisor who wrongfully criticized his character and abilities in order to pass him over and promote a far less experienced co-worker; and the VA support the supervisor in her wrongful criticism of Gibson. Now, Gibson must work for the very supervisor who discriminated against him, a supervisor whose motives and credibility were successfully challenged by Gibson. Gibson is entitled to an award of compensatory damages, front pay and attorneys' fees since October 6, 1995, all in excess of $50,000.

(Complt. ¶¶ 17-18). None of these allegations were contained anywhere in Gibson's EEOC complaint. Therefore, as to these allegations, Gibson has failed to exhaust his administrative remedies.

As a general rule, a Title VII plaintiff is barred from bringing claims in a lawsuit which were not included in his EEOC charge. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Cheek v. Western*

& Southern Life Ins. Co., 31 F.3d 497, 500 (7th Cir. 1994). This rule serves two purposes: (1) it affords an opportunity for the EEOC to settle the dispute between the employee and employer and (2) it places the employer on notice of the charges against it. *Harper v. Godfrey*, 45 F.3d 143, 148 (7th Cir. 1995).

Gibson's EEOC charge simply does not describe the same conduct alleged in this lawsuit. *See Cheek*, 31 F.3d at 501. The new allegations are more in the nature of a retaliation claim and are not like nor reasonably related to the initial and straightforward failure-to-promote claim that Gibson presented to the EEOC. For example, Gibson now seeks to recover for what he labels as a three-year pattern of continued harassment by his supervisor. Yet, absolutely no mention of this pattern was made during Gibson's initial EEO charge. Gibson's harassment complaint also alludes to the fact that his new position requires him to work for this supervisor, yet this allegation significantly post-dates his initial non-selection complaint.

The Court finds that it is appropriate to strike Gibson's new allegations of discrimination based on past and current harassment by his VA supervisor, because he failed to raise them before either the VA or the EEOC, and has consequently failed to exhaust his administrative remedies regarding those claims. Both the VA and the EEOC should be given an opportunity to initially resolve any retaliation claims by Gibson.

Similarly, Gibson's claims of having suffered humiliation, mental anguish and emotional distress,

raised for the first time in this court, are barred.[2] Exhaustion of administrative remedies is a prerequisite to bringing an action under Title VII charging federal discrimination. *Brown*, 425 U.S. at 835.

While this Court acknowledges that policy considerations ordinarily point toward a liberal reading of the scope of an EEOC complaint, *see Egan v. Palos Community Hosp.*, 889 F. Supp. 331, 337 (N.D. Ill. 1995), the Court expressly finds that allowing Gibson to proceed with his new claims before this Court would lead to an easy circumvention of the careful statutory administrative EEOC structure Congress has set up to resolve federal employee discrimination claims. Gibson never provided the VA with notice or an adequate opportunity to resolve his new claims. Gibson's failure to exhaust his administrative remedies regarding his new discrimination claims deprives this Court of jurisdiction over those claims. *Pack v. Marsh*, 986 F.2d 1155, 1157 (7th Cir. 1993). Thus, ¶¶ 17 and 18 of Gibson's complaint, which contain

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[2] This Court also must reject Gibson's claim that it would be futile to force him to request compensatory damages because the EEOC has not explicitly adopted procedures and regulations to address such issues since the passage of the Civil Rights Act of 1991. This assertion overlooks the conciliatory purposes of the federal EEO structure and the specific need to provide notice and an opportunity to settle. These procedures are supposed to be more than a weigh station on the road to federal court. Additionally, the Court rejects plaintiff's argument that the government should be estopped from asserting administrative exhaustion as to his claim for compensatory damages. The Court's review of all the objective evidence indicates that Gibson never asserted facts which would reasonably lead to compensatory damages during the administrative processing of his complaint.

these new claims, are hereby dismissed with prejudice.

The Defendant Is Entitled to Summary Judgment With Respect To Plaintiff's Claims for Front Pay And A Job Transfer

This Court does, however, have jurisdiction to consider Gibson's requests for front pay and a job transfer, which arise out of claims he presented during the administrative process. Therefore, the Court will go on to decide these issues applying the standards for summary judgment.

Despite having received his retroactive promotion to a GS-12 position, Gibson presently seeks an award of front pay. The question of whether a district court may order front pay as part of the equitable relief permitted by Title VII remains an open question in the Seventh Circuit. *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 678 (7th Cir. 1993). However, circuit courts addressing the issue of front pay in Title VII promotion cases have held that the award of front pay is designed to provide plaintiff with the salary differential to which plaintiff would have been entitled had he received the promotion he sought. *Edwards v. Occidental Chem. Corp.*, 892 F.2d 1442, 1448 (9th Cir. 1990). Once plaintiff receives the promotion, there is no basis for a further front pay damage award. *Id.*; *see also E.E.O.C. v. Pacific Press Pub. Ass'n.*, 482 F.Supp. 1291, 1320-21 n. 44 (N.D. Cal. 1979), *aff'd*, 676 F.2d 1272 (9th Cir. 1982).

In this case, there is no dispute that Gibson has received retroactive promotion to a GS-12 accountancy position, and has in fact received retroactive GS-12 backpay and interest on that backpay. (Defendant's

Rule 12(m) Statement at ¶ 16; Exs. 5 and 6). Awarding front pay is therefore legally inappropriate. The defendant is consequently entitled to summary judgment with respect to Gibson's claim for front pay.

Similarly, Gibson's claim for a job transfer is addressed to the sound discretion of this Court. A job transfer is an appropriate remedy when an individual has experienced discrimination specifically with respect to a job transfer, *see Odima v. Westin Tuscon Hotel*, 53 F.3d 1484, 1488 (9th Cir. 1995), or for redressing widespread discrimination in promotion or transfer policies, *see Bowe v. Colgate-Palmolive Co.*, 489 F.2d 896, 901 (7th Cir. 1973); *EEOC v. AT & T*, 419 F. Supp. 1022, 1039 (E.D. Pa. 1976) (Higginbotham, J.). Moreover, transfer is an extraordinary remedy that has a harmful effect on innocent third parties. *See, e.g., Hicks v. Dotham City Bd. of Educ.*, 814 F. Supp. 1044, 1050-52 (M.D.Al.1993); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976); *Romasanta v. United Airlines, Inc.*, 717 F.2d 1140, 1148 (7th Cir. 1983). Displacement should "be used sparingly and only when a careful balancing of the equities indicates that absent 'bumping', plaintiff's relief will be unjustly inadequate." *Hicks*, 814 F. Supp. at 1050 (citations omitted). Given this Court's determinations regarding the proper scope of Gibson's lawsuit and its resulting decision to dismiss ¶¶ 17 and 18 of his complaint, Gibson has not even come close to establishing that he is entitled to the extraordinary remedy of a job transfer.[3] Therefore, the Court hereby

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[3] Gibson's complaint does not explicitly seek outright de novo review of his right to a job transfer, which he did request in his EEO complaint. *See Morris v. Rice*, 985 F.2d 143, 145 (9th Cir.1993) (a federal employee may raise de novo review

grants the defendant summary judgment with respect to Gibson's claim for a job transfer.

Plaintiff's Receipt of Relief Ordered by the EEOC Moots His Enforcement Claims

Finally, Gibson's amended complaint requests the following additional relief, specifically: (1) an order directing the VA to submit a backpay calculation to plaintiff; (2) enforcement of the EEOC decision requiring the VA to adhere to the deadline for payment of the undisputed portion of backpay as if defendant has complied with the deadline for calculating backpay; and (3) attorneys' fees.

Plaintiff's claims for backpay calculations and backpay have been mooted by his receipt of a retroactive GS-12 promotion and backpay and interest. (Defendant's 12(m) Statement at ¶ 16; Exs. 5 and 6). Indeed, plaintiff has shown no harm caused by an alleged delay in receipt of the promotion and backpay.

Plaintiff's Attorneys' Fees Request

The Court, however, does not agree with the defendant's position that plaintiff's request for attorneys' fees also must be denied as moot. Because of the defendant's delay in complying with the EEOC's order, the plaintiff had no choice but to file this lawsuit to ensure compliance. Federal law imposes a strict 90-day deadline after receipt of a final EEOC decision for filing an enforcement action in federal court. 42 U.S.C. § 2000e-16(c). In this case, there is

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remedial issues); *see also Pecher v. Heckler*, 801 F.2d 709, 711 n. 3 (4th Cir.1986). Nevertheless, this Court has independently reviewed this issue and has determined that a job transfer was not warranted under the facts presented to the EEOC.

no question that as of the 90-day deadline, the defendant had not fully complied with the EEOC's order. The defendant asserts that the reasons for this delay were partly caused by the governmental budgetary shutdown as well as plaintiff's own inaction. This Court finds that plaintiff's own actions were not sufficient to excuse all of the delay that occurred in compliance, and certainly do not justify a blanket denial of attorneys' fees under the circumstances of this case.

The Court finds that the uncontested facts establish that the defendant did not fully comply with the EEOC's final order until after the plaintiff filed this lawsuit. Thus, plaintiff is a "prevailing party", entitled to reasonable attorneys' fees since this lawsuit was the "catalyst" to secure enforcement of the EEOC's order. *See Nadeau v. Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978). Thus the Court will enter judgment in favor of plaintiff to this limited extent and retain jurisdiction over this matter for the sole purpose of determining an appropriate award of attorneys' fees for the plaintiff.

CONCLUSION

Defendant's motion to dismiss, or in the alternative for summary judgment, is granted in part and denied in part. Defendant's motion to dismiss (12-1) is hereby granted to the extent that the Court has dismissed Gibson's allegations of jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346. Defendant's motion for summary judgment (12-2) is granted to the extent that the Court has ruled for the defendant on plaintiff's request for enforcement of the remedial EEOC order, compensatory damages, front pay and a job transfer.

Based on the undisputed facts, the Court also finds that the entry of summary judgment in favor of Gibson on his request for attorneys' fees is appropriate. The Clerk of the Court is directed to enter appropriate Fed.R.Civ.P. 58 orders.

The Court will retain jurisdiction over this case to determine a reasonable award of attorneys' fees under the circumstances of this case. This award of fees will be limited to those hours that were reasonably necessary to achieve full compliance with the final EEOC order. Plaintiff is given leave to file his attorneys' fees request by October 30, 1996, and the defendant should file any objections by November 21, 1996. Any reply brief shall be filed by December 1, 1996. The Court will rule by mail.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 96-3776, No. 96 C 223

MICHAEL GIBSON, PLAINTIFF-APPELLANT

v.

JESSE BROWN, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION

[May 7, 1998]

ORDER

Before: RIPPLE, MANION and KANNE, Circuit Judges.

CASTILLO, District Judge.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Plaintiff-Appellant, no judge in active service has requested a vote thereon and all of

the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Section 1981a of Title 42 of the United States Code (1994) provides, in pertinent part, as follows:

Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

* * * * *

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complain-

ing party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

* * * * *

(c) Jury Trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury

* * *

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)

* * * * *

Section 717 of Title VII the Civil Rights Act of 1964, as amended, as codified at 42 U.S.C. 2000e-16 (1994 & Supp. II 1996), provides, in pertinent part, as follows:

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of program reports; consultations

with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. * * *

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department,

agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

* * * * *

(2)

No. 98-238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TOGO D. WEST, JR., SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

Petitioner,

v.

MICHAEL GIBSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether a federal employee's complaint for compensatory damages pursuant to Section 102 of the Civil Rights Act of 1991 should be dismissed for failure to exhaust administrative remedies because he did not use magic words at an earlier stage.

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REASONS FOR DENYING THE PETITION

I. The record in this case is undeveloped on the main issues presented

The district court never considered whether compensatory damages were available at the administrative level. See *Gibson v. Brown*, No. 96 C 223 (N.D. Ill., Oct. 3, 1996) (a copy of the district court's opinion is attached as Appendix B to the VA's cert. petition). The district court never considered the adequacy of the administrative procedure for awarding compensatory damages, nor the sufficiency of any request for general damages made by Gibson after his initial EEO complaint. The district court ruled that Gibson's failure to request compensatory damages in his initial EEO complaint undercut the "conciliatory purposes of the federal EEO structure," regardless of the actual availability of compensatory damages. *Gibson v. Brown,* No. 96 C 223 (N.D. Ill., Oct. 3, 1996), slip op. at 8-9, n.2 (VA's cert. petition, pp. 20a-23a).

The district court reasoned around the availability of compensatory damages at the administrative level because the VA took no position on the issue, apparently conceding Gibson's argument that such damages were not available. The VA did not explicitly argue the availability of compensatory damages at the administrative level until its response brief was filed in the Seventh Circuit. And then, the EEOC cases cited by the VA held that a request for compensatory damages could be made at any stage of the administrative process, contradicting the VA's position in the trial court that compensatory damages had to be requested in the initial EEO complaint.

In the trial court, the parties focused on Gibson's initial EEO complaint: the full administrative record was not submitted to the district court, and the parties did not analyze the record beyond the initial EEO complaint to determine whether Gibson had raised the issue of compensatory damages at some later stage in the proceedings. Fortuitously, the VA included a portion of the transcript of the investigation in its motion. The transcript reveals that when asked by the VA's investigator what he wanted, Gibson replied that he wanted, among other things, a "[m]onetary cash award." *Gibson v. Brown*, 137 F. 3d 992, 994 (7th Cir. 1998).

Thus, assuming *arguendo* that compensatory damages could be awarded at the administrative level, and assuming further that the burden was on Gibson to make the request, it affirmatively appears that Gibson made a sufficiently general request to include compensatory damages. The failure to request compensatory damages does not arise on this record. At best, the record is unclear on this issue, because neither party thought to submit the full administrative record to the district court. The burden was on the VA to demonstrate that Gibson failed to exhaust his administrative remedies, and the record in this case is inadequate to carry the VA's burden.

In addition, the record in this case is undeveloped concerning the adequacy of the administrative remedy. For example, when the VA finally revealed that compensatory damages were available at the administrative level, the EEOC cases cited by the VA indicated that one of the requirements for receiving an award of compensatory damages was "objective evidence" of pain and suffering. See *Simkins v. Runyon*, 1995 WL 597567 *3,

EEOC Appeal No. 01942339 (September 28, 1995). Yet Section 102 of the Civil Rights Act of 1991 does not require "objective evidence" of pain and suffering in order for a victim of discrimination to recover compensatory damages. 42 U.S.C. § 1981a. Again, it was the VA's burden to show the adequacy of the administrative remedy, but the record is largely silent on this issue.

The dispositive issue in this case is whether a federal employee fails to exhaust his administrative remedies by failing to request compensatory damages during agency processing of a discrimination claim. But the full administrative record was not made a part of the record in this case, and the fragmentary record available indicated that Gibson did make a general request for a "monetary cash award." Gibson submits that the failure to request compensatory damages does not arise on this record, and the facts concerning the adequacy of the administrative remedy are not well developed. For these reasons, this case is an inappropriate vehicle for the sweeping precedent sought by the Solicitor General.

II. The Gibson and Fitzgerald cases are distinguishable

The VA argues that the Fifth and Seventh Circuits are in conflict over the availability of compensatory damages at the administrative level, but the conflict is more apparent than real. In *Fitzgerald*, a pharmacy technician for the VA complained of harassment by a pharmacist. 121 F.3d 203, 205. After an investigation, the VA made an "offer of full relief," promising to provide Fitzgerald with a harassment free environment, to ensure that Fitzgerald would not have to work the

same shifts as his harasser, and to discipline Fitzgerald's harasser. 121 F.3d at 205. The VA did not offer compensatory damages, nor did it acknowledge that discrimination occurred. 121 F.3d 205, 210. However, the VA did invite Fitzgerald to call the director of the medical center to discuss the offer. 121 F.3d at 208.

Fitzgerald failed to discuss the offer with the director, and failed to respond to the offer of full relief. 121 F.3d at 208-09. When the VA dismissed his complaint, Fitzgerald appealed to the EEOC, but he failed to raise the issue of compensatory damages in his appeal. 121 F.3d at 205-09. The EEOC affirmed the VA's dismissal, and Fitzgerald filed suit in federal district court. 121 F.3d at 205. The district court found that the VA's offer fully responded to Fitzgerald's claims, and that Fitzgerald's rejection of the offer of full relief constituted a failure to exhaust his administrative remedies. 121 F.3d at 206. Fitzgerald appealed from the dismissal of his complaint. 121 F.3d at 205-06.

The Fifth Circuit Court of Appeals affirmed the dismissal of Fitzgerald's complaint, holding that "administrative agencies may *offer* compensatory damages for emotional injury to federal employees pursuing a Title VII claim." 121 F.3d at 207 (emphasis added). The *Fitzgerald* Court emphasized the purpose of the administrative process in encouraging conciliation and settlement, and the breadth of the delegation by Congress to the EEOC in issuing rules and regulations:

> We think that this mandate, as described in § 2000e-16(b), is sufficiently broad to allow the EEOC to *offer—or to certify or approve an administrative agency's offer* of full relief that includes compensatory damages for emotional injuries.

121 F.3d at 207 (emphasis added). The *Fitzgerald* Court neither considered nor decided any issue of sovereign immunity.

Parenthetically, the *Fitzgerald* Court commented that where federal employees suffer harm that may be remedied by compensatory damages, it was appropriate for the EEOC to grant such relief; the Court did not believe that "Congress would have created an administrative process capable of providing only partial relief." 121 F.2d at 207. Of course, that is precisely what Congress did: The Equal Employment Opportunity Act of 1972, which included what is now § 2000e-16(b), allowed only "equitable" remedies, and it was not until the Civil Rights Act of 1991 that compensatory damages became available. See *Landgraf v. USI Film Products*, 511 U.S. 244, 252-53 (1994); *Crawford v. Babbitt*, 148 F.3d 1318, 1324 (11th Cir. 1998).

The Fifth Circuit also commented that the employee bears the initial burden of notifying his or her agency of the specific relief sought, and that a complainant "may only receive relief for that which he asks." 121 F.3d at 208. The Court cited no authority for these propositions, and EEOC regulations seem to hold the opposite. The regulation concerning original EEO complaints requires precise information as to the identities of the parties and the factual basis for the claim, but the regulation is silent as to requests for relief. See 29 C.F.R. § 1614.106. And the regulations charge both the employing agency and the EEOC with a duty to afford victims of discrimination "full relief," regardless of what the complainant writes in the "corrective action"

box on the initial EEO complaint form. See 29 C.F.R. § 1614.501 and Appendix A to Part 1613.

By contrast, in *Gibson*, an accountant for the VA complained of intentional discrimination in his nonselection to a supervisory accountant position. 137 F.3d 992, 993. When the VA found no discrimination, Gibson appealed to the EEOC, and the EEOC reversed the VA's decision, finding that the VA discriminated against Gibson in the promotion decision. 137 F.3d at 993. The EEOC ordered the VA to promote Gibson and issue backpay, but the EEOC awarded no compensatory damages to Gibson. 137 F.3d at 994. When the VA failed to comply timely with the EEOC order, Gibson filed suit in federal district court seeking enforcement of the order and compensatory damages. 137 F.3d at 994.

While the case was pending in district court, the VA complied with the EEOC order, largely mooting Gibson's enforcement claim. 137 F.3d at 994. The district court interpreted Gibson's request for compensatory damages as an entirely new claim of discrimination, and dismissed it for failure to exhaust administrative remedies. 137 F.3d at 994. Gibson appealed the dismissal. 137 F.3d at 994.

The Seventh Circuit reversed the dismissal of Gibson's complaint, holding that "the EEOC may not *order* the government to pay compensatory damages." 137 F.3d at 998 (emphasis added). The *Gibson* Court focused on the binding force of EEOC adjudication against federal agencies, and found, as a matter of sovereign immunity as well as statutory construction, that

> the statutory scheme promulgated by Congress does not allow the EEOC to issue what

> would be *nonappealable awards* of compensatory damages; compensatory damages are awarded within the jury system established by the statute.

137 F.3d at 996 (emphasis added). Since the EEOC lacked authority to order the VA to pay compensatory damages, Gibson exhausted his administrative remedies and could pursue his request for compensatory damages in district court. 137 F.3d at 996-98.

Thus, whereas *Fitzgerald* involved a failure to exhaust administrative remedies by rejecting an offer of full relief, *Gibson* involved a full adjudication of a discrimination claim with no award of compensatory damages to the victim. Whereas the *Fitzgerald* Court held that administrative agencies may voluntarily offer compensatory damages to complainants, the *Gibson* Court held that the EEOC may not force agencies to pay compensatory damages without recourse to a jury trial. And whereas *Gibson* addressed the sovereign immunity issue, *Fitzgerald* did not. See also *Crawford v. Babbitt*, 148 F.3d 1318, 1324-25 (11th Cir. 1998) (distinguishing *Gibson* from *Fitzgerald* on issue of sovereign immunity).

The Solicitor General gives short shrift to sovereign immunity in his petition for a writ. The full extent of the VA's analysis of this issue is set forth in a single confusing sentence:

> But the [*Gibson*] court offered no authority for the proposition that a waiver of sovereign immunity with respect to judicial proceedings—which the court conceded had occurred—does not encompass a waiver of sovereign immunity with respect to administrative proceedings before the same sovereign.

(VA's cert. petition, p. 16.) Of course, the Solicitor General cites no authority for the proposition that a waiver of sovereign immunity as to judicial proceedings *does* encompass a waiver as to administrative proceedings. The *Gibson* Court reasoned that Congress expressly conditioned its waiver of sovereign immunity for compensatory damages upon the right to a jury trial, and it is this plain limitation on the face of the statute that the VA fails to address.

The *Gibson* and *Fitzgerald* cases are distinguishable. While the opinions are not completely harmonious, the conflict is not great, and is largely explained by the failure of the parties in *Fitzgerald* to raise the issue of sovereign immunity. Now that this issue has been raised in *Gibson* and *Crawford*, other courts will address it, increasing the likelihood of a correct resolution if and when this Court decides to hear it. *Cf.*, *Brown v. Texas*, ___ U.S. ___, 118 S. Ct. 355, 356-57 (1997) (opinion of Stevens, J., respecting denial of certiorari). This Court should deny the petition for a writ of certiorari.

III. The opinion in *Gibson* does not "open the floodgates" to litigation

The Solicitor General raises the specter of thousands of additional cases in federal court if the EEOC is not permitted to award compensatory damages. (VA's cert. petition, p. 13.) Several observations should be made. First, the Solicitor General does not state the number of complainants actually awarded compensatory damages, preferring to use the vague term "often." *Fitzgerald, Gibson* and *Crawford* are all cases in which no

provision for compensatory damages was made. It appears that the government uses the ability to award compensatory damages more often to bar victims' claims under the exhaustion doctrine than it does to award them compensatory damages.

Second, nothing in *Gibson* prohibits the EEOC or federal agencies from voluntarily offering compensatory damages to complainants in settlement, or as offers of full relief. The *Gibson* decision only prevents the EEOC from ordering compensatory damages where federal agencies would be deprived of the right to trial by jury. To the extent that the government desires to reduce congestion in the federal courts, it will be motivated to make fair settlement offers to victims of discrimination, including offers of compensatory damages.

Third, the *Gibson* decision affords no more access to federal courts than Congress provided. Section 102 of the Civil Rights Act of 1991 authorizes awards of compensatory damages in actions under section 717 of the Civil Rights Act of 1964, and section 717 permits aggrieved federal employees to file suit in federal district court. 42 U.S.C. § 1981a(a)(1); 42 U.S.C. § 717(c). Whether compensatory damages are offered voluntarily or awarded by the employing agency or the EEOC, whether compensatory damages are in the amount of zero or one million dollars, Congress has granted access to federal court for every federal employee who believes he or she is aggrieved by an order of an administrative agency.

The federal district courts will not be inundated with federal EEO claims. In a few cases, the government will lose the defense of failure to exhaust administrative

remedies, unless Congress decides to waive sovereign immunity and subject federal agencies to compensatory damage awards without recourse to jury trials. There is nothing unjust or disproportionate in this. Congress has said that compensatory damages should be awarded in jury trials, and so it should be. The government should not be shocked to be treated like all other employers.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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November 1998

No. 98-238

In the Supreme Court of the United States

OCTOBER TERM, 1998

TOGO D. WEST, JR., SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, PETITIONER

v.

MICHAEL GIBSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

SETH P. WAXMAN
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In the Supreme Court of the United States

OCTOBER TERM, 1998

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TOGO D. WEST, JR., SECRETARY,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Petitioner seeks the Court's review to determine whether the Equal Employment Opportunity Commission (EEOC) has the authority to award compensatory damages against agencies of the federal government on claims of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Seventh Circuit held in this case that the EEOC does not possess such authority and, consequently, that respondent did not fail to exhaust administrative remedies, as required by 42 U.S.C. 2000e-16(c), when he did not request compensatory damages from his employing agency in the first instance or from the EEOC on his administrative appeal. Respondent cannot refute that the

decision of the Seventh Circuit in this case conflicts with a recent decision of the Fifth Circuit and with the EEOC's own decisions concerning the scope of its authority to order compensatory damages. The conflict has deepened since the petition was filed as a result of a new decision of the Eleventh Circuit. The frequency with which the issue is arising in the lower courts underscores the need for its prompt resolution by this Court.

1. Respondent initially contends (Br. in Opp. 2-3) that this case is an "inappropriate vehicle" to address the question presented in the petition, because "the record is unclear" as to whether he made an adequate request for compensatory damages at the administrative level. But that issue has been finally resolved against respondent. The Seventh Circuit recognized that "both parties agree that [respondent] never asked to be compensated for emotional distress, or humiliation, nor did he invoke any other term typically associated with a demand for compensatory damages" at the administrative level. Pet. App. 5a. The court thus concluded that, although "[i]t would be simpler if we could say that [respondent] put the EEOC on notice that he was seeking compensatory damages," "the record does not support it." *Ibid.* Respondent did not cross-petition on the Seventh Circuit's holding that he "fail[ed] to exhaust administrative remedies with respect to compensatory damages." *Ibid.* That holding is now the law of this case.

Respondent also asserts (Br. in Opp. 3) that the Court should not review this case because "the facts concerning the adequacy of the administrative remedy are not well developed." But the purely legal question presented in the petition—whether the EEOC has the statutory authority to award compensatory damages

against federal agencies for violations of Title VII—does not require any factual development at all. It is analytically distinct from the question alluded to by respondent concerning the EEOC's standards and procedures for awarding compensatory damages.[1]

2. Respondent next contends (Br. in Opp. 3) that the conflict between the decision below and *Fitzgerald* v. *Secretary, United States Department of Veterans Affairs*, 121 F.3d 203 (5th Cir. 1997), is "more apparent than real," because the two cases involved different facts[2] and because the Seventh Circuit relied on a

---

[1] Respondent erroneously suggests (Br. in Opp. 1) that the government "apparently conced[ed]" in the district court that compensatory damages are not available at the administrative level. The EEOC's authority to award compensatory damages was one of many issues raised by respondent in his response to the government's motion to dismiss or for summary judgment. The government's reply brief, although not specifically addressing that issue (or certain other issues), argued that "[n]othing in [respondent's] response justifies his failure to properly exhaust his administrative remedies concerning these new claims," such as his claim for compensatory damages. Gov't Second Reply Mem. 1; see *id.* at 4 (describing respondent's new claims as including his claim for compensatory damages). No concession can properly be inferred in such circumstances. And respondent acknowledges (Br. in Opp. 1) that the government specifically argued in the court of appeals that compensatory damages are available at the administrative level. See Pet. App. 10a (court of appeals observes that the question of the EEOC's authority to award compensatory damages was fully briefed in this case).

[2] Respondent correctly observes (Br. in Opp. 7) that in this case his claim was decided on the merits at the administrative level, while in *Fitzgerald* the plaintiff's claim was dismissed at the administrative level because he rejected an offer of "full relief" pursuant to 29 C.F.R. 1614.107(h). But that distinction has no significance to the legal issue presented by the petition. Neither respondent nor the plaintiff in *Fitzgerald* asserted a claim for com-

rationale that the Fifth Circuit did not address.[3] But those differences do not render the conflict between the legal holdings of the Fifth Circuit and the Seventh Circuit any less square.

Respondent does not, and cannot, dispute that the Fifth Circuit held in *Fitzgerald* that the EEOC possesses the statutory authority to order compensatory damages awards on Title VII claims against federal agencies, while the Seventh Circuit held in this case that the EEOC does not possess such authority. Compare *Fitzgerald*, 121 F.3d at 207 ("When a federal employee suffers harm that may be remedied by compensatory damages, it is certainly necessary and appropriate for the EEOC to grant such relief.") with Pet. App. 13a ("the EEOC may not order the government to pay compensatory damages"). As a consequence, although plaintiffs in the Fifth Circuit cannot seek compensatory damages in district court on Title VII claims against federal agencies unless they first sought compensatory damages at the administrative level, plaintiffs in the Seventh Circuit need not similarly exhaust their administrative remedies. The conflict between the decisions in this case and *Fitzgerald* was expressly noted by the Seventh Circuit. See Pet. App. 13a ("We simply conclude that Congress has determined it is inappropriate for the EEOC to order

pensatory damages at the administrative level. But both sought compensatory damages in their complaints in federal district court. The legal question whether they were required to present their compensatory damages claims at the administrative level is the same in both cases.

[3] See Pet. 17-18 n.11 (discussing why the Fifth Circuit may not have addressed 42 U.S.C. 1981a(c)(1), the jury trial provision that the Seventh Circuit considered controlling).

the government to pay compensatory damages * * * *Fitzgerald* concludes otherwise.").[4]

3. The conflict has deepened with the Eleventh Circuit's recent decision in *Crawford* v. *Babbitt*, 148 F.3d 1318, 1324-1326 (1998), which held that the EEOC lacks the authority to award, or to order a federal agency to award, compensatory damages for Title VII violations in the federal sector.[5] The Eleventh Circuit adopted reasoning similar to that of the Seventh Circuit in this case. Both courts held that the federal government had conditioned its waiver of sovereign immunity for compensatory damages under Title VII on the availability of a jury trial for the federal agency defendant as well as for the plaintiff. 148 F.3d at 1324; Pet. App. 11a-13a. Both courts therefore concluded that there was no waiver of sovereign immunity for compensatory damages in the administrative process, 148 F.3d at 1324-1325 (citing Seventh Circuit's decision in this case), so that a plaintiff is "not required to raise

[4] See also *Beretta U.S.A. Corp.* v. *Santos*, 712 A.2d 69, 82 n.7 (Md. Ct. Spec. App. 1998) (noting that it is "unclear whether compensatory damages can be awarded by the Equal Opportunity Employment Commission under Title VII at the administrative level") (citing this case and *Fitzgerald*).

[5] The plaintiff in *Crawford* had asserted a sexual harassment claim before her employing agency and indicated that she was seeking, *inter alia*, compensatory damages for the resulting physical and emotional problems. The employing agency concluded that the plaintiff had been a victim of sexual harassment. However, apparently because the plaintiff had offered no evidence to support her claim for compensatory damages, the agency did not award them. 148 F.3d at 1320. The plaintiff elected to file suit immediately rather than to pursue an administrative appeal to the EEOC. The district court dismissed her claim for compensatory damages on the ground that she had not adequately raised such a claim at the administrative level. *Id.* at 1323.

compensatory damages as part of her duty to exhaust administrative remedies," *id.* at 1326. And both courts acknowledged that the Fifth Circuit had reached a different result in *Fitzgerald*. *Id.* at 1325; Pet. App. 13a.[6]

The Eleventh Circuit's decision in *Crawford* provides further indication that the issue presented in the petition is an important and recurring one. The conflicting positions of the Seventh and Eleventh Circuits, on the one hand, and the Fifth Circuit and the EEOC itself, on the other, have created considerable confusion with respect to where claims for compensatory damages under Title VII against agencies of the federal government are to be raised and adjudicated.[7] Respondent has offered no persuasive reason why that confusion should not be resolved in this case.

* * * * *

[6] The government's petition for rehearing with suggestion of rehearing en banc in *Crawford* was denied on November 20, 1998.

[7] As noted in the petition, the EEOC has frequently ordered compensatory damages awards against federal agencies under Title VII where (unlike in this case and *Fitzgerald*) claimants sought such damages at the administrative level and where (unlike in *Crawford*) they offered evidence to substantiate such damages. See Pet. 13 (citing *Turner* v. *Babbitt*, No. 1956390, 1998 WL 223578, at *5-6 (EEOC Apr. 27, 1998), which, in turn, cites several such cases); see also, *e.g.*, *Robison-Matheson* v. *Apfel*, No. 1961574, 1998 WL 776927, at *3-4 (EEOC Oct. 23, 1998) (citing cases); *Mares* v. *Peters*, No. 1962897, 1998 WL 745683, at *5-7 (EEOC Oct. 20, 1998) (citing cases). We are not aware that any statistics have been compiled on the precise number of such cases. But respondent offers no basis for his assertion (Br. in Opp. 9) that "[t]he federal district courts will not be inundated with federal EEO claims" if the EEOC cannot award compensatory damages against federal agencies and thereby resolve Title VII claims fully at the administrative level.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1998

No. 98-238

In the Supreme Court of the United States

OCTOBER TERM, 1998

TOGO D. WEST, JR., SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, PETITIONER

v.

MICHAEL GIBSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED: AUGUST 5, 1998
CERTIORARI GRANTED: JANUARY 15, 1999

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS (CHICAGO)

Docket No. 96-CV-223

MICHAEL GIBSON, PLAINTIFF

v.

TOGO D. WEST, JR, ACTING SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/11/96	1	COMPLAINT; jury demand - Civil cover sheet - Appearance(s) of Timothy Michael Kelly as attorney(s) for plaintiff Michael Gibson with Rule 39 affidavit (No summons(es) issued.) (Documents: 1-1 through 1-4) (ar) [Entry date 01/12/96]
1/11/96	—	RECEIPT regarding payment of filing fee paid; on 1/11/96 in the amount of $ 120.00, receipt # 467351. (Ar) Entry date 01/12/96]

DATE	DOCKET NUMBER	PROCEEDINGS
1/12/96	—	SUMMONS issued as to defendant Jesse Brown (mk) [Entry date 01/22/96]
1/19/96	2	MINUTE ORDER of 1/19/96 by Hon. Ruben Castillo: Status hearing set for 9:30 am on 2/21/96. The Court's review of this complaint indicates that this case is amendable to expedited treatment by the Court. The parties are specifically directed to address this issue in their joint status report, which is to be filed by 2/16/96. Counsel for plaintiff to notify all other parties of this Court's order. (See reverse of minute order). Mailed notice (ar) [Entry date 01/23/96]
1/23/96	3	DESIGNATION OF ATTORNEY Ernest Yi Ling as US Attorney (ar) [Entry date 01/25/96]
1/25/96	4	RETURN OF SERVICE of summons executed upon defendant Jesse Brown on 1/12/96 as to Jesse Brown (ar) [Entry date 01/29/96]

DATE	DOCKET NUMBER	PROCEEDINGS
1/25/96	5	RETURN OF SERVICE of summons executed upon defendant Jesse Brown on 1/12/96 as to the U.S. Attorney (ar) [Entry date 01/29/96]
1/25/96	6	RETURN OF SERVICE of summons executed upon defendant Jesse Brown on 1/12/96 as to the James Burns (ar) [Entry date 01/29/96]
1/25/96	7	RETURN OF SERVICE of summons executed upon defendant Jesse Brown on 1/12/96 as to the Attorney General (ar) [Entry date 01/29/96]
1/25/96	8	DESIGNATION OF ATTORNEY Carole Judith Ryczek as US Attorney (ar) [Entry date 01/29/96]
2/16/96	9	INITIAL STATUS REPORT (nln) [Entry date 02/20/96]
2/16/96	10	STATUS REPORT by defendant; Notice of filing (nln) [Entry date 02/20/96]

DATE	DOCKET NUMBER	PROCEEDINGS
2/21/96	11	MINUTE ORDER of 2/21/96 by Hon. Ruben Castillo: Status hearing held and continued to 9:00 am on 3/22/96. Today's status hearing was held in open court and continued in chambers. All litigation in this case is stayed, including the date for the government's responsive pleading until settlement discussions are fully exhausted. Mailed notice (ar) [Entry date 02/22/96]
3/22/96	—	SCHEDULE set on 3/22/96 by Hon. Ruben Castillo: Status hearing held and continued to 9:00 a.m. on 5/10/96. Discovery ordered closed on 6/28/96. Defendant to answer or otherwise plead on or before 3/29/96. Mailed notice (ro)
4/16/96	12	MOTION by defendant to dismiss the amended [complaint], or in the alternative for summary judgment; Notice of motion. (dk) [Entry date 04/18/96]

DATE	DOCKET NUMBER	PROCEEDINGS
4/16/96	13	MINUTE ORDER of 4/16/96 by Hon. Ruben Castillo: Parties failed to appear. Plaintiff's response to defendant's motion to dismiss [12-1] or in the alternative for summary judgment [12-2] is due 05/16/96. Defendant's reply is due 5/28/96. Motion will be taken under advisement and the court will rule by mail. Status hearing set for 05/10/96 is stricken. Mailed notice (dk) [Entry date 04/18/96]
4/16/96	14	MEMORANDUM by defendant in support of motion to dismiss the amended [12-1], of motion for summary judgment [12-2] (dk) [Entry date 04/18/96]
4/16/96	15	RULE 12(m) Statement of material facts by defendant (Exhibits). (dk) [Entry date 04/18/96]

DATE	DOCKET NUMBER	PROCEEDINGS
5/21/96	16	MOTION by plaintiff to strike exhibits attached to defendant's rule 12(M) statement; Notice of motion. (dk) [Entry date 05/22/96]
5/21/96	17	MINUTE ORDER of 5/21/96 by Hon. Ruben Castillo: Plaintiff's motion to strike exhibits attached to defendant's rule 12(M) statement [16-1] is granted to the extent that exhibits 3 and 4 are stricken. Plaintiff's response to defendant's motion to dismiss [12-1] or, in the alternative for summary judgment [12-2] is due 05/28/96. Defendant reply is due 06/03/96. Court will rule by mail. Mailed notice (dk) [Entry date 05/22/96]
6/3/96	18	REPLY MEMORANDUM by defendant in support of defendant's motion to dismiss the amended [12-1], of motion for summary judgment [12-2] (Exhibits). (dk) [Entry date 06/04/96]

DATE	DOCKET NUMBER	PROCEEDINGS
6/7/96	19	MOTION by plaintiff for leave to file response instanter, or in the alternative for summary judgment; Notice of motion. (dk) [Entry date 06/10/96]
6/7/96	20	MINUTE ORDER of 6/7/96 by Hon. Ruben Castillo: Plaintiff's motion for leave to file response to defendant's motion to dismiss [19-1], or in the alternative for summary judgment instanter [19-2] is granted. Defendant's amended reply is due 06/26/96. A new discovery cutoff date will be set after the court rules on defendant's motion to dismiss [12-1], or in the alternative for summary judgment [12-2]. Mailed notice (dk) [Entry date 06/10/96]
6/7/96	21	MEMORANDUM OF LAW by plaintiff in response to motion to dismiss, or in the alternative [12-1], for summary judgment [12-2]. (dk) [Entry date 06/10/96]

DATE	DOCKET NUMBER	PROCEEDINGS
6/7/96	22	RESPONSE by plaintiff to defendant's rule 12(M) statement (Exhibits). (dk) [Entry date 06/10/96]
6/7/96	23	NOTICE of filing by plaintiff regarding response [22-1], regarding motion response [21-1] (dk) [Entry date 06/10/96]
6/12/96	24	TRANSCRIPT of proceedings for the following date(s): 05/21/96 before Honorable Ruben Castillo (dk) [Entry date 06/13/96]
6/26/96	25	REPLY by defendant to plaintiff Michael Gibson's rule 12(N) statement (Exhibits). (dk) [Entry date 06/27/96]
6/26/96	26	SECOND REPLY by defendant in support of defendant's motion to dismiss [12-1], or in the alternative for summary judgment [12-2] (dk) [Entry date 06/27/96]
10/2/96	27	MEMORANDUM, OPINION, AND ORDER (dk) [Entry date 10/03/96]

DATE	DOCKET NUMBER	PROCEEDINGS
10/2/96	28	MINUTE ORDER of 10/2/96 by Hon. Ruben Castillo: Enter memorandum opinion and order. Defendant's motion to dismiss the amended complaint [12-1], or in the alternative for summary judgment [12-2] is granted in part and denied in part. The court will retain jurisdiction over this case to determine a reasonable award of attorney's fees under the circumstances of this case. Plaintiff is given leave to file his petition for attorney's fees by 10/30/96. Defendant's objections, if any, due 11/21/96. Plaintiff's reply is due 12/01/96. The court will rule by mail terminating case. Mailed notice (dk) [Entry date 10/03/96]
10/2/96	29	ENTERED JUDGMENT (dk) [Entry date 10/03/96]
10/30/96	30	PETITION by plaintiff for attorneys' fees (Attachments); Notice of filing. (dk) [Entry date 10/31/96]

DATE	DOCKET NUMBER	PROCEEDINGS
11/1/96	31	NOTICE OF APPEAL by plaintiff Michael Gibson from judgment entered [29-1], from Scheduling order terminating case [28-1], from motion minute order [28-2], from order [27-1], from motion minute order [17-1] ($105.00 Paid) (cmf) [Entry date 11/04/96]
11/1/96	32	DOCKETING STATEMENT by plaintiff Michael Gibson regarding appeal [31-1]. (cmf) [Entry date 11/04/96]
11/4/96	—	TRANSMITTED to the 7th Circuit the short record on appeal. Mailed notice to all counsel. (cmf)
11/12/96	33	ACKNOWLEDGMENT of receipt of short record on appeal USCA 96-3776 (dk) [Entry date 11/13/96]

DATE	DOCKET NUMBER	PROCEEDINGS
11/21/96	34	MEMORANDUM by defendant in opposition to plaintiff's petition for attorneys' fees [30-1] (dk) [Entry date 11/25/96]
11/26/96	—	TRANSMITTED to the 7th Circuit the long record on appeal no. 96-3776 consisting of one volume of pleadings, together with one volume of transcript of proceedings, filed under separate certificate. Mailed notice to all counsel. (hp)
12/2/96	35	REPLY by plaintiff in support of petition for attorneys' fees [30-1]; Notice of filing. (dk) [Entry date 12/03/96]
12/10/96	36	MINUTE ORDER of 12/10/96 by Hon. Ruben Castillo: Plaintiff's motion for attorneys' fees [30-1] is granted. The court hereby awards plaintiff total attorneys' fees of $5,602.00 and total costs of $352.25. The attorneys' fee award is awarded a rate if $150.00 an hour, which this court expressly finds repre

DATE	DOCKET NUMBER	PROCEEDINGS
		sents the appropriate hourly rate for work of this type in this area. The $5,602.00 figure awards plaintiff's counsel this hourly rate for all work doneprior to the complaint and all necessary work done after the filing of the complaint to the extent he prevailed in this case. Plaintiff is therefore awarded total fees and costs of $5,954.25. The court expressly finds that this is a reasonable fee and costs award under the circumstances of this case. Mailed notice (dk) [Entry date 12/11/96]
5/21/98	37	OPINION from the 7th Circuit: Argued 9/24/97; Decided 3/3/98. (96-3776) (eav) [Entry date 05/28/98]
'1/98	38	CERTIFIED COPY of order from the 7th Circuit: The judgment of the District Court is Reversed, with costs, and this cause is Remanded for further proceedings, in accordance with

DATE	DOCKET NUMBER	PROCEEDINGS
		the decision of this Court entered on this date. [Appeal [31-1] (96-3776) (eav) [Entry date 05/28/98]
5/21/98	39	BILL OF COSTS submitted by U.S. Court of Appeals (eav) [Entry date 05/28/98]
5/21/98	40	LETTER from the 7th Circuit: Retaining record on appeal no. 96-3776 consisting of 1 volume of pleadings and 1 volume of transcripts (eav) [Entry date 05/28/98]
5/28/98	–	SCHEDULE set on 5/28/98 by Hon. Ruben Castillo: Status hearing set for 9:15 a.m. on 6/10/98 for the explicit purpose of setting this case for an immediate trial. Final pretrial order to be submitted on or before 6/24/98. Mailed notice (ro)
6/5/98	41	EMERGENCY MOTION by defendant Jesse Brown to stay trial; Notice of emergency motion (eav) [Entry date 06/10/98]

DATE	DOCKET NUMBER	PROCEEDINGS
6/9/98	42	MINUTE ORDER of 6/9/98 by Hon. Ruben Castillo: Status hearing reset for 9/18/98 at 9:00 a.m. Defendant's emergency motion to stay trial is granted. [41-1] Pretrial order filing date of 6/24/98 is vacated. Government's answer to the complaint is due on or before 6/30/98. Parties are granted leave to conduct damages discovery until 9/15/98. Mailed notice (eav) [Entry date 06/10/98]
6/30/98	43	ANSWER by defendant Togo West Jr to complaint (eav) [Entry date 07/01/98]
9/3/98	45	MOTION by defendant to compel plaintiff to answer defendant's first set of interrogatories and requests to produce (Attachment); Notice of motion (eav) [Entry date 09/09/98]

DATE	DOCKET NUMBER	PROCEEDINGS
9/4/98	44	LETTER from the 7th Circuit returning the record on appeal no. 96-3776 consisting of one volume of pleadings (eav) [Entry date 09/08/98]
9/8/98	46	MINUTE ORDER of 9/8/98 by Hon. Ruben Castillo: Status hearing reset for 11/18/98 at 9:00 a.m. Discovery cutoff extended to 11/30/98. Defendant's motion to compel plaintiff to answer defendant's first set of interrogatories and requests to produce is granted. [45-1] Plaintiff is to comply with all outstanding discovery by 9/22/98. Mailed notice (eav) [Entry date 09/09/98]
11/18/98	–	SCHEDULE set on 11/18/98 by Hon. Ruben Castillo: Status hearing held and continued to 9:15 a.m. on 1/19/99. Plaintiff is to produce all outstanding discovery to the defendant by 12/7/98. Discovery cutoff extended to 12/31/98. mailed notice (ro)

DATE	DOCKET NUMBER	PROCEEDINGS
1/19/99	–	SCHEDULE set on 1/19/99 by Hon. Ruben Castillo: Status hearing held. Counsel for defendant appeared. Counsel should notify this court when the Supreme Court makes it decision regarding this case. mailed notice (ro)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

96-3776

MICHAEL GIBSON, PLAINTIFF-APPELLANT

v.

JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
11/4/96	U.S. civil case docketed. [96-3776] [888735-1] Appearance form due on 12/4/96 for Thomas P. Walsh, for Timothy M. Kelly. Transcript information sheet due 11/14/96. Appellant's brief due 12/16/96 for Michael Gibson (patb)
11/4/96	Filed Appellant Michael Gibson docketing statement. [96-3776] [888739-1] (patb)
11/4/96	[96-3776] ROA from No. Dist. Of Il., E. Div. due 11/15/96. (patb)

DATE	PROCEEDINGS
11/12/96	Filed Seventh Circuit Transcript Information Sheet by Timothy M. Kelly for Appellant Michael Gibson. [96-3776] [888735-1] (tim)
11/12/96	Appearance form filed by attorney(s) Timothy M. Kelly for Appellant Michael Gibson. [96-3776] [888735-1] (grac)
11/26/96	Filed instanter motion by Appellee Jesse Brown to file docketing statement. [894471-1] O&3c docketing statement tendered. [894471-1] [96-3776] (jame)
11/26/96	Original record on appeal filed. Contents of record: 1 vol. pleadings; 1 vol. transcripts; [96-3776] [894538-1] (duda)
11/26/96	Terminated attorney Thomas P. Walsh for Jesse Brown and added attorney Ernest Y. Ling per appearance form. Appearance form filed for Appellee Jesse Brown by attorney Ernest Y. Ling. [96-3776] [888735-1] (jame)
12/2/96	Filed Appellee Jesse Brown docketing statement, per order. [96- 3776] [895524-1] (nanc)

DATE	PROCEEDINGS
12/2/96	ORDER issued GRANTING instanter motion to file docketing statement. [894471-1] The clerk of this court is directed to file instanter the tendered copies of the appellant's Circuit Rule 3(c) docketing statement. [888735-1] AK [96-3776] (patb)
12/6/96	Filed motion by Appellant Michael Gibson to extend time to file appellant's brief. [897993-1] [96-3776] (fern)
12/16/96	ORDER issued GRANTING motion for extension of time to file appellant's brief. [897993-1] AK [96-3776] Appellant's brief due 1/3/97 for Michael Gibson. 2. The appellee(s) brief is due on or before 2/3/97 for Jesse Brown. 3. The reply brief, if any, is due 2/18/97 for Michael Gibson. (tim)
1/2/97	Filed motion by Appellant Michael Gibson to extend time to file appellant's brief. [906439-1] [96-3776] (tim)

DATE	PROCEEDINGS
1/10/97	ORDER issued GRANTING motion for extension of time to file appellant's brief. [906439-1] AK [96-3776] Appellant's brief due 1/14/97 for Michael Gibson. 2. The appellee(s) brief is due on or before 2/14/97 for Jesse Brown. 3. The reply brief, if any, is due 2/28/97 for Michael Gibson. (nanc)
9/24/97	Case heard and taken under advisement by panel: Circuit Judge Kenneth F. Ripple, Circuit Judge Daniel A. Manion, Circuit Judge Michael S. Kanne. [96-3776] [990600-1] (broo)
9/24/97	Case argued by Timothy M. Kelly for Appellant Michael Gibson, Ernest Y. Ling for Appellee Jesse Brown. [96-3776] [888735-1] (broo)
3/3/98	Filed opinion of the court by Judge Manion. The decision of the District Court is REVERSED and this cause is REMANDED for further proceedings. (This opinion was circulated to the full court for a vote on whether to grant rehearing en banc in advance of decision. See Cir.R. 40(e). There were no votes to grant rehearing.) Circuit Judge Kenneth

DATE	PROCEEDINGS
	F. Ripple, Circuit Judge Daniel A. Manion, Circuit Judge Michael E. Kanne, [96-3776] [888735-1] (patb)
3/3/98	ORDER: Final judgment filed per opinion. With costs: y. [96- 3776] [1037637-1] (patb)
3/16/98	Filed Appellant Michael Gibson Bill of Costs in the amount of $993.00. [96-3776] [888735-1] (fran)
4/17/98	Filed 30c Petition for Rehearing with Suggestion for Rehearing Enbanc by Appellee Jesse Brown. Dist. [96-3776] [1053562-1] (orac)
4/21/98	Terminated attorney Ernest Y. Ling for Jesse Brown and added attorneys Marleigh D. Dover and Steve Frank, per appearance form. Appearance form filed for Appellee Jesse Brown by attorneys Marleigh D. Dover and Steve Frank. [96-3776] [929697-1] (orac)
5/7/98	ORDER: Appellee Jesse Brown Petition for Rehearing with Suggestion for Rehearing Enbanc is DENIED. [96-3776] [1053562-1] (heid)

DATE	PROCEEDINGS
5/15/98	MANDATE ISSUED WITH BILL OF COSTS IN THE AMOUNT OF $993.00. RECORD ON APPEAL TO BE RETURNED LATER. (Contents to be returned: 1 vol. pleadings; 1 vol. transcripts.) [96-3776] [929697-1] (nick)
5/22/98	Filed mandate receipt. [96-3776] [1064640-1] (fran)
8/10/98	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No. 98-238. [96-3776] [1088737-1] (jame)
9/3/98	Partial record returned to the District Court. (Contents returned: 1 vol. pleadings. Record to be returned: 1 vol. transcripts.) [96-3776] [888735-1] (fern)
9/28/98	Filed record receipt. [1103730-1] [96-3776] (fran)
1/25/99	Field order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 98-238. [96-3776] [1140882-1] (patb)

Veterans Administration

COMPLAINT OF EMPLOYMENT DISCRIMINATION IN THE VETERANS ADMINISTRATION

(PLEASE PRINT OR TYPE)

VA CENTRAL OFFICE USE ONLY

COMPLAINT NO.

DATE FILED

1. NAME OF COMPLAINANT (Last, First, Middle)	2. ADDRESS (Include P.O. Box, City, State and ZIP Code)	3. TELEPHONE NOS. (Include Home, Work and Area Code)
GIBSON, MICHAEL	1033 S. WESTMORE #206 LOMBARD, IL 60148	HOME 708-627-0508 WORK 708-786-6029
4. NAME OF VA FACILITY INVOLVED	**5. ADDRESS OF VA FACILITY (City, State and ZIP Code)**	**6. YOUR JOB TITLE (Grade and Service or Department, if a VA employee)**
VA SUPPLY DEPOT	PO BOX 27 HINES, IL 60141	ACCOUNTANT GS-9 FISCAL DIVISION

7. BASIS OF COMPLAINT (Check one or more, as appropriate)

- ☐ RACE (Specify)
- ☐ COLOR (Specify)
- ☐ RELIGION (Specify)
- ☑ SEX (✓ Male or ___ Female)
- ☐ NATIONAL ORIGIN (Specify)
- ☐ AGE (Specify date of birth)
- ☐ HANDICAP (See instructions on reverse)
- ☐ REPRISAL (See instructions on reverse)

8. DESCRIBE EACH ISSUE IN YOUR COMPLAINT (For each issue, state what happened, when it happened and who was responsible (if known). Attach additional sheet(s) if required.)

NON-SELECTION FOR ANNOUNCEMENT 92-24 DATED 2-28-92, INSTEAD ANNOUNCEMENT WAS REISSUED AND GIVEN TO AN EMPLOYEE WHO DID NOT QUALIFY FOR BID 92-24. PERSONNEL GAVE NO NOTICE OF CANCELLATION OF BID 92-24, OR SELECTION OF BID 92-41.

9. DESCRIBE HOW THE BASIS AND THE ISSUE (BLOCKS 7 AND 8) ARE RELATED (For example, why do you believe that your race, color, religion, sex, national origin, age, handicap, and/or reprisal were responsible for what happened. Attach additional sheet(s) if required.)

SELECTING OFFICIAL STATED THAT ALL APPLICANTS IN THE FISCAL DIVISION FOR THE POSITION WERE VERY GOOD. IN FACT I WORKED THE POSITION FOR SEVERAL MONTHS, AND FELT I WAS IN THE RIGHT PLACE AT THE RIGHT TIME WITH THE RIGHT CREDENTIALS, HOWEVER A EMPLOYEE WHO DID NOT QUALIFY FOR BID 92-24 WAS SELECTED. I CAN ONLY CONCLUDE THAT PRESELECTION WAS OVER

10. WHAT CORRECTIVE ACTION ARE YOU SEEKING? (Attach additional sheet(s) if required.)

GS-11 BACKPAY, TRANSFER TO VA HINES HOSPITAL, OR OTHER HOSPITAL OF MY CHOICE.

11. DO YOU HAVE A REPRESENTATIVE?	12. NAME OF REPRESENTATIVE
☐ YES ☑ NO	
13. HAVE YOU DISCUSSED THIS COMPLAINT WITH AN EEO COUNSELOR?	**14. NAME OF EEO COUNSELOR**
☑ YES ☐ NO	VAN T. MITCHELL

THIS IS A LEGAL DOCUMENT. PLEASE READ CAREFULLY

CERTIFICATION: I have reviewed the information on this form (and on attachments hereto) and certify that it is true and complete to the best of my knowledge and belief.

15. SIGNATURE OF COMPLAINANT (Do Not Print)		16. DATE
Michael Gibson	EXHIBIT	12-7-92

VA FORM APR 1986 **00-4939**

INSTRUCTIONS

NOTE: Please read carefully before filling in each block. If you need assistance in completing this form, you should contact your EEO Counselor.

Each block is self-explanatory. However, with respect to block 7, if you have checked "Handicap", please provide specific information on the nature of your handicap and whether it is permanent or temporary. If you have checked "Reprisal", please provide an explanation of the nature of the prior complaint activity in which you engaged, that forms the basis for this allegation. For example, did you file a previous EEO complaint? If so, when? Were you a witness or a representative in another individual's prior EEO complaint? If so, whose complaint and when did you serve in that capacity?

Blocks 8 and 9 are crucial for determining the acceptability of your complaint for investigation. Therefore, you should provide as much detail as possible in each of these two blocks, particularly with respect to the exact dates involved. In addition, the issues described in block 8 should be limited to those issues discussed with the EEO Counselor in a timely fashion (i.e., within 30 calendar days of occurrence of the act or within 30 calendar days of the effective date of the act, if a personnel action). If any of the acts which you discussed with the EEO Counselor were not brought to the attention of the EEO Counselor in a timely fashion, time limits may be waived under limited circumstances. However, in order for time limits to be waived, you must explain, in detail, why you were untimely. In addition, this complaint must be filed within 15 calendar days of your receipt of a notice of final interview with an EEO Counselor. If you do not file the complaint within the required 15 calendar days, you must also explain your untimeliness in similar fashion. It is essential that you include explanations of any untimeliness when you file your complaint, along with all evidence which may support your explanation. Failure to do so may result in rejection of your complaint.

NOTICE

IT IS YOUR RESPONSIBILITY AS A COMPLAINANT TO KEEP THE VETERANS AMDINISTRATION INFORMED OF YOUR CURRENT ADDRESS. IF YOU MOVE, YOU SHOULD IMMEDIATELY ADVISE THE VETERANS ADMINISTRATION OFFICE WHERE YOU FILED THIS COMPLAINT OF YOUR NEW ADDRESS. FAILURE TO DO SO COULD RESULT IN CANCELLATION OF YOUR COMPLAINT. IN ADDITION, YOU MAY, FROM TIME TO TIME, RECEIVE CORRESPONDENCE IN CONNECTION WITH THIS COMPLAINT BY CERTIFIED MAIL. IT IS YOUR RESPONSIBILITY TO CLAIM ALL CERTIFIED MAIL. SINCE SOME OF THIS MAIL MAY REQUIRE A RESPONSE FROM YOU WITHIN A SPECIFIC TIME FRAME, FAILURE TO CLAIM CERTIFIED MAIL COULD RESULT IN CANCELLATION OF YOUR COMPLAINT FOR FAILURE TO RESPOND TO COMPLAINT RELATED CORRESPONDENCE IN A TIMELY FASHION.

PRIVACY ACT STATEMENT

Collection of the information on this form is authorized and/or required by the regulations of the U.S. Equal Employment Opportunity Commission (EEOC), 29 CFR, Section 1613, and/or by the Veterans Administration (VA), in VA Manual MP-7, Part I, Chapter 3. The information collected will be used by the VA to determine whether your complaint is acceptable for investigation and in connection with any subsequent investigation and decision on your complaint. In the course of any investigation as may occur, this form may be shown to any individual who may be required by regulations, policies or procedures of the EEOC and/or the VA to provide information in connection with this complaint, including individuals you may have identified as responsible for the matters at issue in this complaint.

9.

MADE BASED ON SEX, ALL SUPERVISORS ARE NOW FEMALE. THIS TYPE OF DISCRIMINATION SHOULD NEVER BE TOLERATED, HOWEVER WHEN ITS AIMED AT A VETERAN, AT THE VETERANS SUPPLY DEPOT, WORDS CAN'T DESCRIBE IT. VETERANS ARE WHY WE HAVE JOBS.

GPO 922-681

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 96 C 0233

MICHAEL GIBSON, PLAINTIFF

vs.

JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, DEFENDANT

COMPLAINT

Plaintiff Michael Gibson, by his attorney Timothy M. Kelly, complains of defendant Jesse Brown, Secretary of the Department of Veterans Affairs, as follows:

1. Plaintiff Michael Gibson is a natural person residing in Lombard, Illinois, in the Northern District of Illinois.

2. Defendant Jesse Brown is the Secretary of the Department of Veterans Affairs, an agency in the executive branch of the government of the United States of America.

3. The transactions and events giving rise to this complaint occurred in whole or in substantial part in Hines, Illinois, in the Northern District of Illinois.

4. The United States District Court has jurisdiction of this cause pursuant to 28 U.S.C. § 1331 (federal

question); 28 U.S.C. § 1346 (United States defendant); and 42 U.S.C. §§ 2000e-5 and 2000e-16 (employment discrimination).

5. Throughout 1992, plaintiff Michael Gibson ("Gibson") was employed as a GS-9 Accountant in the Department of Veterans Affairs ("VA") Fiscal Division, Supply Depot, Hines, Illinois. In 1992, the VA advertised a position as a GS-12 Supervisory Accountant, which would have represented a promotion for Gibson. Gibson applied for the promotion, but the VA selected a female applicant.

6. On December 7, 1992, Gibson filed a timely equal employment opportunity complaint alleging discrimination based on sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

7. On December 28, 1993, the VA issued its final agency decision finding no discrimination.

8. On January 24, 1994, Gibson filed a timely appeal with the United States Equal Employment Opportunity Commission ("EEOC") from the decision of defendant Jesse Brown, Secretary of the VA.

9. On October 6, 1995, the EEOC issued its final decision, reversing defendant's decision. A true and accurate copy of the EEOC's decision is attached to this complaint as Exhibit "A."

10. The EEOC found that Gibson established a *prima facie* case of discrimination on the basis of sex, and that the VA's purported nondiscriminatory reasons for passing over Gibson, including his supervisor's criti-

cisms, "were a pretext for discrimination." (Exhibit A, pp. 6, 8.)

11. The EEOC ordered the VA to promote Gibson to the GS-12 Supervisory Accountant position within 30 days, and to calculate backpay within 60 days. Although the EEOC ordered the VA to pay Gibson's attorney's fees, Gibson processed his own claim up to the date of the EEOC decision. The EEOC did not order the VA to pay front pay, compensatory damages for mental anguish or emotional distress, or attorney's fees in enforcing the EEOC's order or in pursuing further remedies.

12. The VA has filed no request for reconsideration or appeal from the decision of the EEOC, and the time for doing so has expired. Therefore, the VA cannot contest the EEOC decision, and the EEOC decision is binding upon the VA.

13. The VA has promoted Gibson to GS-12, but it did not do so within the time ordered by the EEOC.

14. The VA has neither calculated nor paid Gibson his backpay in violation of the EEOC order.

15. Gibson received the EEOC decision on October 13, 1995. This complaint is filed within the 90 day period for filing civil actions.

16. Gibson accepts and adopts the EEOC decision with respect to the VA's liability for employment discrimination, and Gibson's entitlement to promotion, backpay and attorney's fees through October 6, 1995. Gibson is entitled to an order enforcing the EEOC decision on these matters.

17. In addition to the wrongful deprivation of the promotion and backpay, Gibson has suffered and is continuing to suffer humiliation, mental anguish and emotional distress as a direct and proximate result of the VA's intentional and unlawful discrimination. Gibson worked for three years under a supervisor who wrongfully criticized his character and abilities in order to pass him over and promote a far less experienced co-worker; and the VA supported the supervisor in her wrongful criticism of Gibson. Now, Gibson must work for the very supervisor who discriminated against him, a supervisor whose motives and credibility were successfully challenged by Gibson.

18. Gibson is entitled to an award of compensatory damages, front pay, and attorney's fees since October 6, 1995, all in an amount in excess of $50,000.00.

WHEREFORE, plaintiff Michael Gibson requests that this Honorable Court enter judgment in his favor against defendant Jesse Brown, Secretary, Department of Veterans Affairs, as follows:

A. Ordering defendant to submit a backpay calculation to plaintiff forthwith;

B. Enforcing the EEOC decision requiring the VA to adhere to the deadline for payment of the undisputed portion of backpay as if defendant has complied with the deadline for calculating backpay;

C. Declaring the rights of the parties with respect to assignment, transfer, retirement, pension and other terms and benefits of employment;

D. Setting a trial by jury as to compensatory damages;

E. Entering judgment in favor of plaintiff against defendant for compensatory damages; and

F. Awarding plaintiff front pay, attorney's fees and such other or further relief as may be deemed just.

PLAINTIFF DEMANDS A JURY TRIAL AS TO ALL ISSUES TRIABLE BY JURY.

Respectfully Submitted,

BEERMANN, SWERDLOVE, WOLOSHIN, BAREZKY, BECKER, GENIN & LONDON

By: /s/ TIMOTHY M. KELLY
TIMOTHY M. KELLY

BEERMANN, SWERDLOVE, WOLOSHIN
BAREZKY, BECKER, GENIN & LONDON
Attorneys for plaintiff
161 North Clark Street, #2600
Chicago, IL 60601-3221
312/621-9700
KELL464.1

[Seal Omitted]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

Appeal No. 01941821
Agency No. 93-2306

MICHAEL GIBSON, APPELLANT

v.

JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, AGENCY

DECISION

INTRODUCTION

On January 24, 1994, Michael Gibson (hereinafter, appellant) filed an appeal with the Equal Employment Opportunity Commission (hereinafter, the Commission or the EEOC) from a final decision of the Secretary, Department of Veterans Affairs (hereinafter, the agency) dated December 28, 1993. The final agency decision (FAD) concerns appellant's equal employment opportunity (EEO) complaint, alleging discrimination based on sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* The

Commission hereby accepts the appeal in accordance with EEOC Order No. 960, as amended.

ISSUES PRESENTED

Whether appellant proved by a preponderance of the evidence that the agency discriminated against him on the basis of sex (male) when in late 1992, he was nonselected for the position of Supervisory Accountant, GS-11/12, under either Vacancy Announcement (VA) No. 92-23 or 92-41.

CONTENTIONS ON APPEAL

Appellant contends that the agency's reasons to support the contested selection lack credence. As proof, he maintains that the justification provided by the agency contradicts the performance appraisals he consistently received and also notes that management never counseled him about his alleged deficiencies.

The agency insists that the criticisms voiced by the agency are not at odds with appellant's performance appraisals since they impact on qualifications such as motivation and initiative which are different from the "division-wide" standards applied to performance assessments.

BACKGROUND

On December 7, 1992, appellant filed a formal EEO complaint raising the issue stated above. The complaint was investigated and following the investigation, appellant was timely provided a copy of the investigative file. Appellant then requested a hearing before an EEOC Administrative Judge (AJ) but later withdrew his petition and instead requested a FAD based on the existing record. The agency issued it's [*sic*] decision on

December 28, 1993, finding no discrimination. It is from this decision that appellant now appeals.

At the time of the alleged discriminatory act, appellant was employed by the agency as a GS-9 Accountant in the Fiscal Division, Supply Depot, Hines, Illinois. He began his employment with the agency in 1988 as an accountant in Albuquerque, New Mexico. He was assigned to the Hines facility in 1990.

On February 28, 1992, the agency advertised the subject position nation-wide at the GS-11/12 level through VA 92-24. Appellant applied for the position and was interviewed but was not selected. The record discloses that a female applicant from another state was initially awarded the position but declined the offer. Then, a male candidate was selected but this selection was disapproved by Central Office. On June 6, 1992, the agency readvertised the position in-house under VA 92-41, at the GS-9/11/12 level. The selectee (ST), a GS-9 female accountant with the Fiscal Division since 1991, was the only new applicant under the second announcement.

Appellant contended that he was far more qualified than the ST. In this regard, appellant claimed that the ST lacked the technical knowledge and the experience for the position due to her short tenure at the Fiscal Division and her limited exposure to the different accounting functions conducted in the Division. As a consequence, appellant maintained that the ST did not have the necessary expertise to perform as a supervisor. He noted that during the 13 years he had worked at the Fiscal Division, he had received "four satisfactory, five highly satisfactory, and four superior performance ratings". He had received several cash

awards and special contribution awards in recognition of his work as well. In addition, and contrary to the ST, he was selected for and completed the 12-month VA Central Office Accountant program.

The record discloses that the selecting officials (SOs) for the contested position were the Chief of the Fiscal Division (CFD) and the Assistant Financial Manager (AFM), both females.

The CFD testified that she based her decision on a review of information submitted by the applicants, taking into consideration "education, experience, if they had supervisory experience . . ., motivation and initiative . . . the accuracy and thoroughness of work, supervisory skills, if any, training, past performance ratings, writing ability is extremely important and cooperation with peers and supervisors." Regarding the ST, the CFD noted that she "had a lot of banking and accounting experience from prior years . . . about 10 years . . . she was extremely motivated . . . had won an award for being on a special project . . . had excellent writing ability . . . teacher credentials . . . was good in helping other people . . . [and] she worked on receivables and has gotten those down to the lowest level we have had since I have been here."[1]

In reference to appellant, the CFD observed that she was dissatisfied with his performance because appellant had submitted the functional cost report two months late on one occasion when he was detailed as a supervisor. The witness also noted that when appellant was "acting Chief" of the accounting section, he com-

[1] The CFD acknowledged that it had been another coworker and not the ST who received "an award for receivables," however.

plained to her several times that "he couldn't get the cooperation of the people who worked for him," which in her view demonstrated lack of leadership. The CFD further noted that appellant was argumentative during his tenure as acting Chief. When the document control system was implemented, he told her that he needed five additional persons to do the job without offering her any alternative.

In her opinion, appellant "lacked the initiative to attempt to improve the accuracy and efficiency of the section appearing to be satisfied with the status quo." Although she acknowledged that appellant had "sufficient training and experience," the CFD maintained that his "motivation and initiative were average." Notwithstanding this observation, the CFD noted that during his tenure as acting Chief, appellant received fully successful performance ratings in 1989 and 1990 and a highly successful one in 1991.

The AFM also provided testimony in this matter. The AFM testified that although the ST did not have the experience working in other areas of the accounting section outside the function of accounts receivables, she was "very motivated." The affiant also observed that "you don't need to have expertise to be a supervisor." In this connection, the AFM maintained that accounts receivables was "a very important part of the accounting section." The witness observed that in reaching their decision, she and the CFD took into consideration "education . . . training . . . supervisory comments, . . . academic achievements and attitude." She further observed that the ST had experience in "accounting and banking" in private industry, was a "hard worker," and also participated in a study conducted by the Service

and Reclamation Division. As to appellant, the AFM asserted that he "was not as motivated as [the ST]" and noted that "[appellant] didn't put any effort into improving the procedures." The affiant reiterated the CFD's testimony that appellant had required five individuals to perform document control and also that appellant "had some problems getting subordinates' cooperation." The witness failed to provide specific details to support her observations. The AFM further noted that in December 1991 Central Office requested that operations expenses be reduced but that appellant failed to do a cost study and did not address said request.[2]

Appellant rebutted the SOs' testimony, claiming that the ST had been preselected for the position and favored by management since she came to the Fiscal Division in February 1991. In this regard, appellant noted that the ST came to the Division at the GS-7 level and was promoted to the contested supervisory position in 1-1/2 years. Responding to the charge that as an acting Chief he was argumentative and requested five additional employees to implement document control procedures, appellant observed that he discussed this matter with the CFD but denied being argumentative. In support of his position at that time, appellant noted that "now they have a database that does that managed by a full time employee." Appellant denied that he complained to the CFD about lack of cooperation from his subordinates or that he refused to comply with a request from Central Office pertaining to expense reduction. In regard to the request from Central Office,

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[2] The AFM acknowledged that she did not know if appellant actually performed the study because she was on vacation.

appellant claimed that he did not know what the CFD really meant. Appellant explained that when he was Chief Accountant he had to deal with a discrepancy in a certain account and to this effect he called Central Office. Appellant indicated that he was told by Central Office that the problem would be addressed at their level, not at Hines, and that he informed the CFD about the instructions he received from Central Office.

A review of both VAs 92-24 and 92-41 discloses the following knowledge, skills and abilities as rating factors for the position:

1. Ability to effectively communicate orally and in writing.

2. Knowledge of supervisory methods and techniques to develop, motivate and manage an accounting staff.

3. Knowledge of principles and practices of Accounts Receivable/Payable, cost accounting, cost control and budget planning involving CALM and Log/CALM computer systems.

4. Knowledge of Federal accounting language, accounting principles, financial statements, and determining the nature and quality of the operations.

5. Knowledge of and understanding of computer technology, including electronic data interchange in a modern fiscal organization.

The agency had failed to include in the file a copy of appellant's SF-171.[3] The ST's SF-171 reveals that she earned a BA degree in January 1991 and began her employment at the Supply Depot on February 1991 as an Accountant in the Analysis and Reconciliation Section. In her SF-171, the ST indicated that prior to her current position, from 1983 to 1989, she worked part-time (30 hours) as the office manager (60%) and bookkeeper (40%) of a music studio, where she supervised one employee. From 1983 through 1989, she was employed by a Bank as a Teller (60%) and bookkeeper (40%) of a music studio, where she supervised one employee. From 1983 through 1989, she was employed by a Bank as a Teller (60%) and Account Representative (40%). From 1977 through 1983, she served as a rental representative in a car rental corporation. The ST's SF-171 is dated June 3, 1992. On June 12, 1992, the ST submitted an employee supplemental qualifications statement to her SF-171, in which she extensively addressed the KSAs set forth in the Vacancy Announcement.

Pursuant to the facility's Merit Promotion Policy No. 6-88, candidates for GS positions were rated by a promotion panel unless there were six or less qualified candidates for the job. Since the applicant pools for VAs 92-24 and 92-41 were of six or less candidates, no promotion panel was needed. The record shows that an "unofficial merit promotion panel"[4] was constituted to rate the applicants, however. Appellant was awarded

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[3] The agency did include [a] copy of the SF-171 submitted by the male applicant initially selected by the agency as its second choice. This document is irrelevant to the matter before us.

[4] The record does not identify the members of this panel.

the highest score, 18 points. The ST received 8 points, the lowest rating of all the in-house applicants.

According to appellant's testimony, appellant served as supervisory account for five months and also served as supervisory accountant[5] from September 16 through December 15, 1991. The record reveals that in March 1992 appellant applied for the position of Assistant Chief, Fiscal Service, in Prescott, Arizona. The AFM prepared appellant's supervisory appraisal, and from out of six KSA's she gave applicant two 5's and four 4's. An examination of this document reveals that in reference to element 1, "Knowledge of accounting and budget operations in order to make sound decisions involving funds," the AFM noted in relevant part, "This experience accords him the ability to identify and analyze problems and find alternative solutions to these problems as demonstrated by his performance specially when he served as Acting Chief of Accounting. . . ."

Pertaining to element two, "Ability to organize work, establish priorities and meet deadlines," the AFM indicated "He is excellent in organizing work, establishing priorities and meeting deadlines. This ability was best demonstrated when he was Acting Chief of Accounting. All reports under his control were submitted on time. . . ."

With regard to element five for which he received five score points, "Ability to manage, supervise and assign workloads, delegate authority, etc." the AFM stated: "He acquired these abilities when he served as Chief of Accounting. He managed the section very well. He

[5] This position is frequently referred to by management as "Chief of Fiscal Service."

recognized problems and addressed them accordingly. He assigned workloads and delegated authority to his subordinates. By doing these, he found sufficient time to manage and supervise the accounting staff."

The record discloses that appellant was rated "highly successful" for the period April 1, 1991, through March 31, 1992. This performance appraisal was ratified by the AFM. The referenced appraisal covered the period appellant was detailed as supervisory accountant (September 16, 1991 through December 15, 1992).

The record reveals that all managerial positions in the Fiscal Division were held by females.

ANALYSIS AND FINDINGS

Appellant's allegation of discrimination concerns disparate treatment in employment. This allegation of intentional employment discrimination is properly analyzed under a three-part evidentiary scheme. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973) (applying the evidentiary scheme to Title VII); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-259 (1981) (clarifying the scheme).

The record indicates that appellant succeeds in establishing a *prima facie* case of discrimination on the basis of sex. It is undisputed that appellant was qualified for the position and despite his qualifications the position was awarded to a female.

The agency, through the SOs, articulated legitimate nondiscriminatory reasons to justify nonselecting appellant. Appellant lacked the attitude and motivation

to successfully perform in a supervisory position. In support of this contention, the agency points to appellant's alleged deficiencies when he served as acting Chief of the accounting section and further notes that appellant was argumentative, untimely in his reports, and his "motivation and initiative were average." The Commission finds that the agency has met its burden of going forward with the evidence.

In order to prevail, appellant must now show by a preponderance of the evidence that the reasons advanced by the agency are pretextual. Based on the evidence of record, the Commission finds that appellant

According to the SOs, appellant was not selected because they were dissatisifed with his performance while detailed as a supervisor. In this regard, the CFD testified that appellant submitted the functional cost report two months late, complained that he could not get the cooperation of his subordinates, and was argumentative when he requested more personnel to implement the document control system. In addition, the AFM observed that appellant failed to address a cost study request from Central Office. The agency further contended that, in contrast to appellant, the ST was a "hard worker" and was "extremely motivated," had impressive writing ability and was good in helping people, qualities she enhanced through her teaching experience. The agency also highlighted the fact that the ST had significantly lowered the accounts receivables and had also received an award for her participation in a study conducted by the Service and Reclamation division. The agency emphasized the ST's "banking" experience in the private sector and further observed that accounts receivables, the accounting

function to which the ST was assigned, was "a very important part of the accounting section."

After carefully reviewing all the evidence before us, we find that the agency's reasons for not selecting appellant, as articulated by the SOs, are unsupported by the record.

The record discloses that appellant had been an accountant with the agency since 1988. The agency has not disputed his testimony that during these years of employment he had received cash awards and special contributions awards in recognition of his work. Nor has the agency denied that his performance appraisals had been above average throughout the years. It is significant to note that he received a "highly successful" rating which covered the period he performed as acting Chief of the accounting section. This performance appraisal was approved by the AFM. The record further reveals that when in March 1992 appellant applied for the position of Assistant Chief, Fiscal Service, in Prescott Arizona, the AFM gave appellant a glowing supervisory appraisal for promotion, mostly based on his successful accomplishments as Acting Chief of Accounting in the Hines Supply Depot. The record further discloses that appellant was selected for and completed the 12-months VA Central Office account program. Furthermore, when assessed by the unofficial merit promotion panel that rated the applicants, the panel awarded appellant the highest score (18 points) as compared with the ST who received the lowest rating (8 points).

Regarding the ST, we note, that she came to the agency in 1991 and that her work had been limited to the accounts receivable function. Her SF-171 demonstrates

that her "banking experience" had been embellished by the agency and also that she had no teaching credentials whatsoever. Although we do not dispute the fact that this employee (the ST) may well have had outstanding qualities, the issue before us is whether this individual was equally or better qualified than appellant. The weight of the evidence establishes that she was not. We find no merit in the agency's contention, as stated in its FAD, that it was appellant's performance as supervisor and not his performance as an accountant which provided the basis for his non-selection. There is not evidence that he was counseled over these deficiencies. He received a highly successful appraisal during his tenure as supervisor. He was issued a glowing supervisory appraisal for promotion to a supervisory position as Assistant Chief of Fiscal Services in another location.

This Commission has consistently held that employers have greater flexibility when choosing management-level employees, because of the nature of such positions. *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987). We find, however, that the ST's experience and qualifications for the job could not compare to appellant's. In cases where the complainant is found objectively better qualified than the ST, the use of subjective criteria such as "motivation," "initiative," and "cooperation" while not impermissible, "may offer a convenient pretext for giving force and effect to . . . prejudice." *Thornton v. Coffey*, 618 F.2d 686, 691 (10th Cir. 1980). Such standardless subjective criteria have been found to be convenient mechanisms for discrimination. *Boykin v. Georgia Pacific Corp.*, 706 F.2d 1384, 1390 (5th Cir. 1983); *cert. denied*, 465 U.S. 1006 (1984). This is particularly true where, as here, the subjective reasons

given for not choosing appellant were unsupported by independent evidence.

In light of all the above, the Commission is not persuaded that the agency has rebutted the inference of discrimination established by appellant through his *prima facie* case. We find that the inconsistencies found in the testimony provided by the SOs, when compared with other evidence of record, discredit the agency's proffered reasons. As the record stands, we conclude that the agency's reasons to justify its selection of the ST lack credence and were a pretext for discrimination.

CONCLUSION

Accordingly, after a review of the entire record, the Commission hereby REVERSES the final agency's decision. The agency shall comply with the following ORDER.

ORDER (D1092)

The agency is ORDERED to take the following remedial action:

Within 30 calendar days of its receipt of this decision, the agency shall promote appellant to the position of Supervisory Accountant, GS-11/12, retroactive to the date the ST was selected.

The agency shall determine the appropriate amount of backpay with interest, and other benefits due appellant, pursuant to 29 C.F.R. §1614.501, no later than sixty (60) calendar days after the date this decision becomes final. The appellant shall cooperate in the agency's efforts to compute the amount of backpay and benefits due, and

shall provide all relevant information requested by the agency. If there is a dispute regarding the exact amount of backpay and/or benefits, the agency shall issue a check to the appellant for the undisputed amount within sixty (60) calendar days of the date the agency determines the amount it believes to be due. The appellant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the agency's calculation of backpay and other benefits due appellant, including evidence that the corrective action has been implemented.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0595)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the appellant. If the agency does not comply with the Commission's order, the appellant may petition the Commission for enforcement of the order. 29 C.F.R.

§1614.503 (a). The appellant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. *See* 29 C.F.R. §§1614,408, 1614.409, and 1614.503 (g). Alternatively, the appellant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.408 and 1614.409. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. §2000e-16(c) (Supp. V 1993). If the appellant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. *See* 29 C.F.R. §1614.410.

POSTING ORDER (G1092)

The agency is ORDERED to post copies of the attached notice at the Supply Depot, Hines, Illinois. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H1092)

If applicant has been represented by an attorney (as defined by 29 C.F.R. §1614.501 (e)(1)(iii), he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. §1614.501 (e). The award of attorney's fees shall be paid by the agency. The attorney shall submit a verified statement of fees to the agency—*not* to the Equal Employment Opportunity Commission, Office of the Federal Operations—within thirty (30) calendar days of this decision becoming final. The agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. §1614.501.

STATEMENT OF RIGHTS-ON APPEAL

RECONSIDERATION (M0795)

The Commission may, in its discretion, reconsider the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or

3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date you receive this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. *See* 29 C.F.R. §1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. *See* 29 C.F.R. § 1614.604(c).

RIGHT TO FILE A CIVIL ACTION (R0993)

This is a decision requiring the agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District

Court. It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. In the alternative, you may file a civil action AFTER ONE HUNDRED AND EIGHTY (180) CALENDAR DAYS of the date you filed your complaint with the agency, or filed your appeal with the Commission. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action

without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

/s/ RONNIE BLUMENTHAL
RONNIE BLUMENTHAL, Director
Office of Federal Operations

OCT 06 1995
DATE

[Seal Omitted]

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Washington, D.C. 20036

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
An Agency of the United States Government

This Notice is posted pursuant to an Order by the United States Equal Employment Opportunity Commission dated _____ which found that a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* has occurred at this facility.

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, or PHYSICAL or MENTAL DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

The Supply Depot at Hines, Illinois, supports and will comply with such Federal law and will not take action against individuals because they have exercised their rights under law.

The Supply Depot at Hines, Illinois, has remedied the employee affected by the Commission's finding. The Supply Depot at Hines, Illinois, will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the require-

ments of all Federal equal employment opportunity laws.

The Supply Depot at Hines, Illinois, will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercise his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, Federal equal employment opportunity law.

_____

Date Posted: _____

Posting Expires: _____

29 C.F.R. Part 1614

PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

SUBPART A—AGENCY PROGRAM TO PROMOTE EQUAL EMPLOYMENT OPPORTUNITY

§ 1614.101 General policy.

(a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or handicap and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

(b) No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e *et seq.*), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 *et seq.*), the Equal Pay Act (29 U.S.C. 206(d)) or the Rehabilitation Act (29 U.S.C. 791 *et seq.*) or for participating in any stage of administrative or judicial proceedings under those statutes.

§ 1614.102 Agency program.

(a) Each agency shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies. In support of this program, the agency shall:

(1) Provide sufficient resources to its equal employment opportunity program to ensure efficient and successful operation;

(2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and

the instructions contained in the Commission's Management Directives;

(3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions;

(4) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, national origin, age or handicap, and solicit their recruitment assistance on a continuing basis;

(5) Review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(6) Take appropriate disciplinary action against employees who engage in discriminatory practices;

(7) Make reasonable accommodation to the religious needs of applicants and employees when those accommodations can be made without undue hardship on the business of the agency;

(8) Make reasonable accommodation to the known physical or mental limitations of qualified applicants and employees with handicaps unless the accommodation would impose an undue hardship on the operation of the agency's program;

(9) Reassign, in accordance with § 1614.203(g), non-probationary employees who develop physical or mental limitations that prevent them from performing the essential functions of their positions even with reasonable accommodation;

(10) Provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in equal employment opportunity;

(11) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort;

(12) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(13) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation; and

(14) Participate at the community level with other employers, with schools and universities and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

(b) In order to implement its program, each agency shall:

(1) Develop the plans, procedures and regulations necessary to carry out its program;

(2) Appraise its personnel operations at regular intervals to assure their conformity with its program,

this part 1614 and the instructions contained in the Commission's management directives;

(3) Designate a Director of Equal Employment Opportunity (EEO Director), EEO Officer(s), and such Special Emphasis Program Managers (e.g., People With Disabilities Program, Federal Women's Program and Hispanic Employment Program), clerical and administrative support as may be necessary to carry out the functions described in this part in all organizational units of the agency and at all agency installations. The EEO Director shall be under the immediate supervision of the agency head;

(4) Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and prominently post such written materials in all personnel and EEO offices and throughout the workplace;

(5) Ensure that full cooperation is provided by all agency employees to EEO Counselors and agency EEO personnel in the processing and resolution of pre-complaint matters and complaints within an agency and that full cooperation is provided to the Commission in the course of appeals, including granting the Commission routine access to personnel records of the agency when required in connection with an investigation; and

(6) Publicize to all employees and post at all times the names, business telephone numbers and business addresses of the EEO Counselors (unless the counseling function is centralized, in which case only the telephone number and address need be publicized and posted), a notice of the time limits and necessity of

contacting a Counselor before filing a complaint and the telephone numbers and addresses of the EEO Director, EEO Officer(s) and Special Emphasis Program Managers.

(c) Under each agency program, the EEO Director shall be responsible for:

(1) Advising the head of the agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports and other matters pertaining to the policy in § 1614.101 and the agency program;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and to improve the agency's program for equal employment opportunity;

(4) Providing for counseling of aggrieved individuals and for the receipt and processing of individual and class complaints of discrimination; and

(5) Assuring that individual complaints are fairly and thoroughly investigated and that final decisions are issued in a timely manner in accordance with this part.

(d) Directives, instructions, forms and other Commission materials referenced in this part may be

obtained in accordance with the provisions of 29 CFR 1610.7 of this chapter.

§ 1614.103 Complaints of discrimination covered by this part.

(a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the aggrieved individual is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of handicap) or the Equal Pay Act (sex-based wage discrimination) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.

(b) This part applies to:

(1) Military departments as defined in 5 U.S.C. 102;

(2) Executive agencies as defined in 5 U.S.C. 105;

(3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority; and

(4) All units of the legislative and judicial branches of the Federal Government having positions in the competitive service, except for complaints under the Rehabilitation Act.

(c) Within the covered departments, agencies and units, this part applies to all employees and applicants for employment, and to all employment policies or practices affecting employees or applicants for employment including employees and applicants who are paid from nonappropriated funds, unless otherwise excluded.

(d) This part does not apply to:

(1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section:

(2) Employees of the General Accounting Office;

(3) Employees of the Library of Congress;

(4) Aliens employed in positions, or who apply for positions, located outside the limits of the United States; or

(5) Equal Pay Act complaints of employees whose services are performed within a foreign country or certain United States territories as provided in 29 U.S.C. 213(f).

§ 1614.104 Agency processing.

(a) Each agency subject to this part shall adopt procedures for processing individual and class complaints of discrimination that include the provisions contained in §§ 1614.105 through 1614.110 and in § 1614.204, and that are consistent with all other applicable provisions of this part and the instructions for complaint processing contained in the Commission's Management Directives.

(b) The Commission shall periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally, to process complaints in a timely manner, to develop adequate factual records, to issue decisions that are consistent with acceptable legal standards, to explain the reasons for its decisions, and to give complainants adequate and timely notice of their rights.

§ 1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

(b) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing after an investigation by the agency, election rights pursuant to §§ 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to § 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in precomplaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be

alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling.

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the agency has an established dispute resolution procedure under paragraph (f) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person brought the matter to the Counselor's attention. If the matter has not been resolved, the aggrieved person shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that

the agency is informed immediately if the complainant retains counsel or a representative.

(e) Prior to the end of the 30-day period, the aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.

(f) Where the agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the pre-complaint processing period shall be 90 days. If the matter has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

(g) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter.

§ 1614.106 Individual complaints.

(a) A complaint must be filed with the agency that allegedly discriminated against the complainant.

(b) A complaint must be filed within 15 days of receipt of the notice required by § 1614.105 (d), (e) or (f).

(c) A complaint must contain a signed statement from the person claiming to be aggrieved or that per-

son's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

(d) The agency shall acknowledge receipt of a complaint in writing and inform the complainant of the date on which the complaint was filed. Such acknowledgement shall also advise the complainant that:

(1) the complainant has the right to appeal the final decision or dismissal of all or a portion of a complaint; and

(2) The agency is required to conduct a complete and fair investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the period.

§ 1614.107 Dismissals of complaints.

The agency shall dismiss a complaint or a portion of a complaint:

(a) That fails to state a claim under § 1614.103 or § 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;

(b) That fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with § 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

(c) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(d) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and § 1614.301 or § 1614.302 indicates that the complainant has elected to pursue the non-EEO process;

(e) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory;

(f) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

(g) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available; or

(h) If, prior to the issuance of the notice required by § 1614.108(f), the complainant refuses within 30 days of

receipt of an offer of settlement to accept an agency offer of full relief containing a certification from the agency's EEO Director, Chief Legal Officer or a designee reporting directly to the EEO Director or the Chief Legal Officer that the offer constitutes full relief, provided that the offer gave notice that failure to accept would result in dismissal of the complaint. An offer of full relief under this subsection is the appropriate relief in § 1614.501.

§ 1614.108 Investigation of complaints.

(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.

(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or

affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances. The Commission will, upon request, supply the agency with the name of an investigator with appropriate security clearances.

(e) The agency shall complete its investigation within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 1614.107. By

written agreement within those time periods, the complainant and the respondent agency may voluntarily extend the time period for not more than an additional 90 days. The agency may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain information classified pursuant to Exec. Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the investigating agency notifies the parties of the extension.

(f) Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to § 1614.110 from the agency with which the complaint was filed. In the absence of the required notice, the complainant may request a hearing at any time after 180 days has elapsed from the filing of the complaint.

§ 1614.109 Hearings.

(a) When a complainant requests a hearing, the agency shall request that the Commission appoint an administrative judge to conduct a hearing in accordance with this section. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances. Where the administrative

judge determines that the complainant is raising or intends to pursue issues like or related to those raised in the complaint, but which the agency has not had an opportunity to address, the administrative judge shall remand any such issue for counseling in accordance with § 1614.105 for such other processing as ordered by the administrative judge.

(b) *Discovery.* The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the administrative judge prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(c) *Conduct of hearing.* Agencies shall provide for the attendance at a hearing of all employees approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any

person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

(d) The procedures in paragraphs (d) (1) through (3) of this section apply to hearings of complaints:

(1) The complainant, an agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the administrative judge deems necessary.

(2) Administrative judges are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness,

would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as appropriate.

(e) *Findings and conclusions without hearing.* (1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (d)(1) of this section. The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue findings and con-

clusions without a hearing or make such other ruling as is appropriate.

(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue findings and conclusions without holding a hearing.

(f) *Record of hearing.* The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the administrative judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the administrative judge shall make the document available to the agency representative for reproduction.

(g) *Findings and conclusions.* Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing findings of fact and conclusions of law, within 180 days of a request for a hearing being received by EEOC, an administrative judge shall issue findings of fact and conclusions of law on the merits of the complaint, and shall order appropriate relief where discrimination is found with regard to the matter that gave rise to the complaint. The administrative judge shall send copies of the entire record, including the transcript, and the findings and conclusions to the parties by certified mail, return receipt requested. Within 60 days of receipt of the findings and conclusions, the agency may reject or modify the findings and conclusions or the relief

ordered by the administrative judge and issue a final decision in accordance with § 1614.110. If an agency does not, within 60 days of receipt, reject or modify the findings and conclusions of the administrative judge, then the findings and conclusions of the administrative judge and the relief ordered shall become the final decision of the agency and the agency shall notify the complainant of the final decision in accordance with § 1614.110.

§ 1614.110 Final decisions.

Within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision, or within 60 days of receiving the findings and conclusions of an administrative judge, the agency shall issue a final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part. The final decision shall contain notice of the right to appeal to the Commission, the name and address of the agency official upon whom an appeal should be served, notice of the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573, Notice of Appeal/Petition, shall be attached to the decision.

* * * * *

SUBPART D-APPEALS AND CIVIL ACTIONS

§ 1614.401 Appeals to the Commission.

(a) A complainant may appeal an agency's final decision, or the agency's dismissal of all or a portion of a complaint.

(b) An agent may appeal the agency decision accepting or dismissing all or a portion of a class complaint, or a final decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and both may appeal a final decision on a petition pursuant to § 1614.204(g)(4).

(c) A grievant may appeal the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised. A grievant may not appeal under this part, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration, is before the FLRA, is appealable to the MSPB or if 5 U.S.C. 7121(d) is inapplicable to the involved agency.

(d) A complainant, agent or individual class claimant may appeal to the Commission an agency's alleged noncompliance with a settlement agreement or final decision in accordance with § 1614.504.

§ 1614.402 Time for appeals to the Commission.

(a) Except for mixed case complaints, any dismissal of a complaint or a portion of a complaint or any final decision may be appealed to the Commission within 30 days of the complainant's receipt of the dismissal or final decision. Any grievance decision may be appealed

within 30 days of receipt of a decision referred to in § 1614.401(c). In the case of class complaints, any final decision received by an agent, petitioner or an individual claimant may be appealed to the Commission within 30 days of its receipt. Where a complainant has notified the EEO Director of alleged noncompliance with a settlement agreement in accordance with § 1614.504, the complainant may file an appeal 35 days after service of the allegations of noncompliance, but must file an appeal within 30 days of receipt of an agency's determination.

(b) If the complainant is represented by an attorney of record, then the 30- day time period provided in paragraph (a) of this section within which to appeal shall be calculated from the receipt of the required document by the attorney. In all other instances, the time within which to appeal shall be calculated from the receipt of the required document by the complainant.

§ 1614.403 How to appeal.

(a) The complainant, agent, grievant or individual class claimant (hereinafter complainant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P.O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile. The complainant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what he or she is appealing.

(b) The complainant shall furnish a copy of the appeal to the agency's EEO Director (or whomever is designated by the agency in the dismissal or decision) at the same time that he or she files the appeal with the Commission. In or attached to the appeal to the Com-

mission, the complainant must certify the date and method by which service was made on the agency.

(c) If a complainant does not file an appeal within the time limits of this subpart, the appeal will be untimely and shall be dismissed by the Commission.

(d) Any statement or brief in support of the appeal must be submitted to the Director, Office of Federal Operations, and to the agency within 30 days of filing the appeal. Following receipt of the appeal and any brief in support of the appeal, the Director, Office of Federal Operation, will request the complaint file from the agency. The agency must submit the complaint file and any agency statement or brief in opposition to the appeal to the Director, Office of Federal Operations, within 30 days of receipt of the Commission's request for the complaint file, which has been made by certified mail. A copy of the agency's statement or brief must be served on the complainant at the same time.

§ 1614.404 Appellate procedure.

(a) On behalf of the Commission, the Office of Federal Operations shall review the complaint file and all written statements and briefs from either party. The Commission may supplement the record by an exchange of letters or memoranda, investigation, remand to the agency or other procedures.

(b) If the Office of Federal Operations requests information from one or both of the parties to supplement the record, each party providing information shall send a copy of the information to the other party.

§ 1614.405 Decisions on appeals.

(a) The Office of Federal Operations, on behalf of the Commission, shall issue a written decision setting

forth its reasons for the decision. The Commission shall dismiss appeals in accordance with §§ 1614.107, 1614.403(c) and 1614.410. The decision shall be based on the preponderance of the evidence. If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to interest, attorney's fees or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or her civil action rights, and be transmitted to the complainant and the agency by certified mail, return receipt requested.

(b) A decision issued under paragraph (a) of this section is final within the meaning of § 1614.408 unless:

(1) Either party files a timely request for reconsideration pursuant to § 1614.407; or

(2) The Commission on its own motion reconsiders the case.

§ 1614.406 Time limits. [Reserved]

§ 1614.407 Reconsideration.

(a) Within a reasonable period of time, the Commission may, in its discretion, reconsider any decision of the Commission issued under § 1614.405(a) notwithstanding any other provisions of this part.

(b) A party may request reconsideration of any decision issued under § 1614.405(a) provided that such request is made within 30 days of receipt of a decision of the Commission or within 20 days of receipt of another party's timely request for reconsideration. Such request, along with any supporting statement or brief, shall be submitted to the Office of Review and Appeals and to all parties with proof of such sub-

mission. All other parties shall have 20 days from the date of service in which to submit all other parties, with proof of submission, any statement or brief in opposition to the request.

(c) The request or the statement or brief in support of the request shall contain arguments or evidence which tend to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued; or

(2) The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or

(3) The decision is of such exceptional nature as to have substantial precedential implications.

(d) A decision on a request for reconsideration by either party is final and there is no further right by either party to request reconsideration of the decision for which reconsideration was sought.

§ 1614.408 Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 90 days of receipt of the final decision on an individual or class complaint if no appeal has been filed;

(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and a final decision has not been issued;

(c) Within 90 days of receipt of the Commission's final decision on an appeal; or

(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

§ 1614.409 Civil action: Equal Pay Act.

A complainant is authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. 216(b)) to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, three years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for filing a civil action.

§ 1614.410 Effect of filing a civil action.

Filing a civil action under § 1614.408 or § 1614.409 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing.

SUBPART E—REMEDIES AND ENFORCEMENT

§ 1614.501 Remedies and relief.

(a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or

an employee has been discriminated against, the agency shall provide full relief which shall include the following elements in appropriate circumstances:

(1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.

(b) *Relief for an applicant.* (1)(i) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position that the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to

accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit.

(ii) If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed by 5 CFR 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty unless clear and convincing evidence indicates that the applicant would not have been selected even absent discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The individual shall be deemed to have performed service for the agency during this period for all purposes except for meeting service requirements for completion of a required probationary or trial period.

(iii) If the offer of employment is declined, the agency shall award the individual a sum equal to the back pay he or she would have received, computed in the manner prescribed by 5 CFR 550.805, from the date he or she would have been appointed until the date the offer was declined, subject to the limitation of paragraph (b)(3) of this section. Interest on back pay shall be included in the back pay computation. The agency shall inform the applicant, in its offer of employment, of the right to this award in the event the offer is declined.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds by clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency shall

nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) Back pay under this paragraph (b) for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

(c) *Relief for an employee.* When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 CFR 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) The agency has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.

(e) *Attorney's fees or costs*–(1) *Awards of attorney's fees or costs.* The provisions of this paragraph relating to the award of attorney's fees or costs shall apply to allegations of discrimination prohibited by title VII and the Rehabilitation Act. In a notice of final action or a decision, the agency or Commission may award the applicant or employee reasonable attorney's fees or costs (including expert witness fees) incurred in the processing of the complaint.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid only for services performed after the filing of a written complaint and after the complainant has notified the agency that he or she is represented by an attorney, except that fees allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Written submissions to the agency that

are signed by the representative shall be deemed to constitute notice of representation.

(2) *Amount of awards.* (i) When the agency or the Commission awards attorney's fees or costs, the complainant's attorney shall submit a verified statement of costs and attorney's fees (including expert witness fees), as appropriate, to the agency within 30 days of receipt of the decision unless a request for reconsideration is filed. A statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be awarded the complainant shall be determined by agreement between the complainant, the complainant's representative and the agency. Such agreement shall immediately be reduced to writing.

(ii)(A) If the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 days of the agency's receipt of the verified statement and accompanying affidavit, the agency shall issue a decision determining the amount of attorney's fees or costs due within 30 days of receipt of the statement and affidavit. The decision shall include a notice of right to appeal to the EEOC along with EEOC Form 573, Notice of Appeal/Petition and shall include the specific reasons for determining the amount of the award.

(B) The amount of attorney's fees shall be calculated in accordance with existing case law using the following standards: The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate. This amount may be reduced or increased

in consideration of the following factors, although ordinarily many of these factors are subsumed within the calculation set forth in this paragraph (e)(2)(ii)(B): The time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the attorney's preclusion from other employment due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases. Only in cases of exceptional success should any of these factors be used to enhance an award computed by the formula set forth in this paragraph (e)(2)(ii)(B).

(C) The costs that may be awarded are those authorized by 28 U.S.C. 1920 to include: Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case; fees and disbursements for printing and witnesses; and fees for exemplification and copies necessarily obtained for use in the case.

(iii) Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness.

§ 1614.502 Compliance with final Commission decisions.

(a) Relief ordered in a final decision on appeal to the Commission is mandatory and binding on the agency except as provided in § 1614.405(b). Failure to imple-

ment ordered relief shall be subject to judicial enforcement as specified in § 1614.503(g).

(b) Notwithstanding paragraph (a) of this section, when the agency requests reconsideration, when the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the decision recommends retroactive restoration, the agency shall comply with the decision only to the extent of the temporary or conditional restoration of the employee to duty status in the position recommended by the Commission, pending the outcome of the agency request for reconsideration.

(1) Service under the temporary or conditional restoration provisions of this paragraph (b) shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the Commission upholds its decision after reconsideration.

(2) The agency shall notify the Commission and the employee in writing, at the same time it requests reconsideration, that the relief it provides is temporary or conditional.

(c) When no request for reconsideration is filed or when a request for reconsideration is denied, the agency shall provide the relief ordered and there is no further right to delay implementation of the ordered relief. The relief shall be provided in full not later than 60 days after receipt of the final decision unless otherwise ordered in the decision.

§ 1614.503 Enforcement of final Commission decisions.

(a) *Petition for enforcement.* A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to the Office of Federal Operations. The petition shall specifically set forth the reasons that lead the complainant to believe that the agency is not complying with the decision.

(b) *Compliance.* On behalf of the Commission, the Office of Federal Operations shall take all necessary action to ascertain whether the agency is implementing the decision of the Commission. If the agency is found not to be in compliance with the decision, efforts shall be undertaken to obtain compliance.

(c) *Clarification.* On behalf of the Commission, the Office of Federal Operations may, on its own motion or in response to a petition for enforcement or in connection with a timely request for reconsideration, issue a clarification of a prior decision. A clarification cannot change the result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision.

(d) *Referral to the Commission.* Where the Director, Office of Federal Operations, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission, or, as directed by the Commission, refer the matter to another appropriate agency.

(e) *Commission notice to show cause.* The Commission may issue a notice to the head of any federal agency that has failed to comply with a decision to show

cause why there is noncompliance. Such notice may request the head of the agency or a representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for non-compliance.

(f) *Certification to the Office of Special Counsel.* Where appropriate and pursuant to the terms of a memorandum of understanding, the Commission may refer the matter to the Office of Special Counsel for enforcement action.

(g) *Notification to complainant of completion of administrative efforts.* Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 et seq., and the mandamus statute, 28 U.S.C. 1361, or to commence de novo proceedings pursuant to the appropriate statutes.

§ 1614.504 Compliance with settlement agreements and final decisions.

(a) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. A final decision that has not been the subject of an appeal or civil action shall be binding on the agency. If the complainant believes that the agency has failed to comply with the terms of a settlement agreement or

final decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of [the] settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

(b) The agency shall resolve the matter and respond to the complainant, in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or final decision. The complainant may file such an appeal 35 days after he or she has served the agency with the allegations of noncompliance, but must file an appeal within 30 days of his or her receipt of an agency's determination. The complainant must serve a copy of the appeal on the agency and the agency may submit a response to the Commission within 30 days of receiving notice of the appeal.

(c) Prior to rendering its determination, the Commission may request that parties submit whatever additional information or documentation it deems necessary or may direct that an investigation or hearing on the matter be conducted. If the Commission determines that the agency is not in compliance and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased. Allegations that subsequent acts of discrimination violate a

settlement agreement shall be processed as separate complaints under § 1614.106 or § 1614.204, as appropriate, rather than under this section.

No. 98-238

In the Supreme Court of the United States

OCTOBER TERM, 1998

TOGO D. WEST, JR., SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, PETITIONER

v.

MICHAEL GIBSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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4188

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission has the authority to award compensatory damages against agencies of the federal government for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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Lehman v. *Nakshian*, 453 U.S. 156 (1981) 9, 33
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McCormick v. *United States Postal Serv.*, EEOC Appeal No. 01954168, 1996 WL 562668 (Sept. 25, 1996) 5
McKart v. *United States*, 395 U.S. 185 (1969) . 17, 18, 19
Morton v. *Ruiz*, 415 U.S. 199 (1974) 14
New York Gaslight Club v. *Carey*, 447 U.S. 54 (1980) 19
Price v. *United States Postal Serv.*, EEOC Appeal No. 01945860, 1996 WL 600763 (Oct. 11, 1996) 5, 6
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 27
Taunton v. *Brown*, EEOC Appeal No. 01943687, 1995 WL 481019 (Aug. 9, 1995) 6
Tolbert v. *United States*, 916 F.2d 245 (5th Cir. 1990) 18
Turner v. *Babbitt*, EEOC Appeal No. 1956390, 1998 WL 223578 (Apr. 27, 1998) 20

Statutes and regulations:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* ..... *passim*
§ 706, 42 U.S.C. 2000e-5 5
§ 706(g), 42 U.S.C. 2000e-5(g) 22
§ 706(g)(1), 42 U.S.C. 2000e-5(g)(1) 5
§ 706(k), 42 U.S.C. 2000e-5(k) 22
§ 717, 42 U.S.C. 2000e-16 ..... 5, 11, 24, 25, 26, 27

Statutes and regulations—Continued: Page

§ 717(a), 42 U.S.C. 2000e-16(a) (Supp. II 1996) 3
§ 717(b), 42 U.S.C. 2000e-16(b) 3, 10, 14, 15, 16, 24, 27, 29, 34
§ 717(c), 42 U.S.C. 2000e-16(c) 3, 10, 17, 18, 25, 28
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ..... *passim*
Tit. I:
§ 102, 105 Stat. 1072 (42 U.S.C. 1981a) 5, 15
42 U.S.C. 1981a(a)(1) ..... *passim*
42 U.S.C. 1981a(b)(1) 5
42 U.S.C. 1981a(b)(2) 22
42 U.S.C. 1981a(b)(3) 30-31
42 U.S.C. 1981a(c)(1) 8, 12, 28, 29, 33
42 U.S.C. 1981a(d)(1) 25-26
Tit. III (Government Employee Rights Act) 21
§§ 301-325, 105 Stat. 1088-1099 21
§ 302(1), 105 Stat. 1091 22
§ 307, 105 Stat. 1091 21
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§§ 308-309, 105 Stat. 1092-1094 22
Congressional Accountability Act of 1995, Pub. L. No. 104-1, Tit. I, §§ 101-102, 109 Stat. 4-6 (2 U.S.C. 1301 *et seq.* (Supp. II 1996)) 23, 29, 34
2 U.S.C. 1311(b)(1)(B) 23
2 U.S.C. 1404 ..... 23, 29
2 U.S.C. 1405(g) 11, 23
2 U.S.C. 1406(a) 23
2 U.S.C. 1406(c) 23
2 U.S.C. 1407(a) 23
2 U.S.C. 1407(d) 23
2 U.S.C. 1408(c) 23, 29
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (42 U.S.C. 2000e-16(a) (1994 & Supp. II 1996)) 2

Statutes and regulations—Continued: Page

Workforce Investment Act of 1998, Pub. L. No. 105-220, § 341(a), 112 Stat. 1092 3
29 C.F.R. (1998):
Section 1614.105(a) 4
Section 1614.105(d) 4
Section 1616-106(d)(2) 4
Section 1614.108(e) 4
Section 1614.109(g) 4
Section 1614.108(f) .....
Section 1614.110 ..... 4, 5
Section 1614.504(a) 28

Miscellaneous:

Civil Rights Act of 1991: Hearings on H.R. 1 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 1st Sess. (1991) 31
137 Cong. Rec. (1991):
p. 28,903 22
p. 28,926 30
p. 29,020 26
p. 29,021 26
pp. 29,021-29,022 30
p. 29,030 30
p. 29,041 30
p. 29,051 30
pp. 29,053-29,054 30
p. 30,644 30
p. 30,668 30
p. 30,677 30
p. 30,690 30
141 Cong. Rec. 659 (1995) 23-24
Office of Fed. Operations, EEOC, *Federal Sector Report on Complaints Processing and Appeals by Federal Agencies for Fiscal Year 1997* (1998)..... 20

Miscellaneous—Continued: Page

Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoners Cases*, 77 Geo. L.J. 1567 (1989) 31-32
43 Fed. Reg. 19,807 (1978) 3
Donna M. Gitter, *French Criminalization of Racial Employment Discrimination Compared to the Imposition of Civil Penalties in the United States*, 15 Comp. Lab. L. J. 488 (1994) 32
2 *Hearings on H.R. 4000, The Civil Rights Act of 1990: Joint Hearings Before the House Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) 31, 32
H.R. Rep. No. 40, 102d Cong., 1st Sess. (1991):
Pt. 1 16
Pt. 2 30
Mary Kathryn Lynch, *The Equal Employment Opportunity Commission: Comments on the Agency and Its Role in Employment Discrimination Law*, 20 Ga. J. Int'l & Comp. L. 89 (1990) 32-33
Sharlene A. McEvoy, *The Umpire Strikes Out: Postema v. National League: Major League Gender Discrimination*, 11 U. Miami Ent. & Sports L. Rev. 1 (1993) 32
John J. Ross, *The Employment-Law Year in Review (1991-1992)*, 441 PLI Litig. & Admin. Practice Course Handbook Series (1992) 32
S. Rep. No. 415, 92d Cong., 1st Sess. (1971) 15, 17
Statement of President George Bush Upon Signing S. 1745, 27 Weekly Comp. Pres. Doc. 1701 (Nov. 25, 1991) 31
Rachel H. Yarkon, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 Harv. Negotiation L. Rev. 165 (1997) 32

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-238

TOGO D. WEST, JR., SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, PETITIONER

v.

MICHAEL GIBSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 137 F.3d 992. The opinion of the district court (Pet. App. 15a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1998. A petition for rehearing was denied on May 7, 1998 (Pet. App. 29a). A petition for a writ of certiorari was filed on August 5, 1998, and was granted on January 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title 42 of the United States Code are set forth in the appendix to the petition.

STATEMENT

This case concerns whether compensatory damages are among the administrative remedies available to federal employees, or applicants for federal employment, who assert claims against federal agencies for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

1. In 1972, Congress extended Title VII's prohibition against employment discrimination on the basis of "race, color, religion, sex, or national origin" to the federal government. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. 2000e-16(a) (1994 & Supp. II 1996)); see *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 825 (1976) ("Until it was amended in 1972 * * * , Title VII did not protect federal employees."). But Title VII was not to apply to the federal government in precisely the same manner that it applied to other employers. Congress crafted a distinct set of "administrative and judicial enforcement mechanisms," *Brown*, 425 U.S. at 831, for claims of employment discrimination asserted by federal employees and applicants for federal employment.[1]

[1] Section 2000(e)-16(a) extends the protections of Title VII to civilian employees or applicants for employment in executive agencies, military departments, the Postal Service, the Postal Rate Commission, the Government Printing Office, the General Accounting Office, the Library of Congress, the Smithsonian Institution, and those units of the judicial branch of the federal government and of the District of Columbia government having positions in the competitive service. 42 U.S.C. 2000e-16(a) (Supp. II 1996); Pub. L. No. 105-220, § 341(a), 112 Stat. 1092.

Congress delegated initially to the Civil Service Commission, and later to the Equal Employment Opportunity Commission (EEOC),[2] the authority to "enforce" Title VII against the federal government "through appropriate remedies, including reinstatement or hiring of employees with or without back pay." 42 U.S.C. 2000e-16(b). At the same time, Congress imposed "certain preconditions," *Brown*, 425 U.S. at 832, on a federal employee's ability to file a civil action in federal district court with respect to a claim of employment discrimination. See 42 U.S.C. 2000e-16(c). Those prerequisites are designed to provide an opportunity for the resolution of an employment-discrimination claim in an administrative process, including "through conference, conciliation, and persuasion[,] before the aggrieved party [is] permitted to file a lawsuit." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

The federal employee first "must seek relief in the agency that has allegedly discriminated against him." *Brown*, 425 U.S. at 832. If the employee is dissatisfied with the agency's disposition of his claim, he may "seek further administrative review with the [EEOC]" or, alternatively, may "file suit in federal district court without appealing to the [EEOC]." *Ibid.* If the employee does appeal to the EEOC, but is dissatisfied with the EEOC's decision, he then may file suit in district court. *Ibid.* An employee also "may file a civil

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action if, after 180 days from the filing of the charge or the appeal, the agency or [the EEOC] has not taken final action." *Ibid.*

The EEOC has promulgated regulations to govern the administrative processing of claims of employment discrimination against federal agencies. An aggrieved employee first must notify an equal employment opportunity (EEO) counselor at his employing agency of the allegedly discriminatory act. 29 C.F.R. 1614.105(a). If the EEO counselor determines that the matter cannot be resolved informally, the employee is advised of his right to file a formal complaint with the agency. 29 C.F.R. 1614.105(d). The agency is required to conclude "a complete and fair investigation" of the complaint within 180 days unless the parties agree to extend the period. 29 C.F.R. 1614.106(d)(2), 1614.108(e). Once the agency has completed the investigation and provided the employee with a copy of the investigative file, the employee may request a hearing before an EEOC administrative judge or an immediate final decision from the agency. 29 C.F.R. 108(f). If the employee requests a hearing, the administrative judge is required to issue findings of fact and conclusions of law, and to "order appropriate relief where discrimination is found," within 180 days of the hearing request unless good cause exists for extending that time. 29 C.F.R. 1614.109(g). Within 60 days after receiving the administrative judge's decision or the employee's request for a final decision without a hearing, the agency is required to issue a final decision, which "shall consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief." 29 C.F.R. 1614.110.

2. In 1991, Congress authorized awards of compensatory damages in "action[s] brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964." Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, § 102, 105 Stat. 1072 (codified at 42 U.S.C. 1981a(a)(1)). Section 717, 42 U.S.C. 2000e-16, is the provision of the Civil Rights Act of 1964 governing Title VII claims against the federal government, while Section 706, 42 U.S.C. 2000e-5, is the provision governing Title VII claims against other employers. Title VII had previously authorized only back pay and equitable remedies. See 42 U.S.C. 2000e-5(g)(1).[3]

Since 1992, the EEOC has taken the position that "the Civil Rights Act of 1991 * * * makes compensatory damages available to federal sector complainants in the administrative process." *Jackson* v. *United States Postal Serv.*, EEOC Appeal No. 01923399 (Nov. 12, 1992), slip op. 3.[4] The EEOC has announced procedures to ensure that federal agencies include compensatory damages among the "appropriate remedies and relief," 29 C.F.R. 1614.110, awarded to their employees who are found to be victims of discrimination. If an employee indicates during the administrative process that he has sustained damages as a consequence of the alleged discrimination,[5] the agency must request from

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[3] The Civil Rights Act of 1991 also authorized awards of punitive damages in Title VII actions against private employers, but not in those against "a government, government agency or political subdivision." 42 U.S.C. 1981a(b)(1).

[4] See also *Price* v. *United States Postal Serv.*, EEOC Appeal No. 01945860, 1996 WL 600763, at *3 (Oct. 11, 1996); *McCormick* v. *United States Postal Serv.*, EEOC Appeal No. 01954168, 1996 WL 562668, at *2 (Sept. 25, 1996).

[5] The EEOC has made clear that "a complainant need not use legal terms of art such as 'compensatory damages,' but may merely use words or phrases to put the agency on notice that the relevant

the employee "objective evidence that he or she has incurred compensatory damages, and that the damages are related to the alleged unlawful discrimination." *Jackson*, slip op. 3. If the employee presents such evidence, the agency must address the issue of compensatory damages in any decision finding liability. See, *e.g.*, *Taunton* v. *Brown*, EEOC Appeal No. 01943687, 1995 WL 481019, at *4-*5 (Aug. 9, 1995); *Larochelle* v. *Dalton*, EEOC Appeal No. 01934530, 1993 WL 762933, at *2-*3 (Dec. 21, 1993).

3. In 1992, respondent Michael Gibson, an accountant employed by the Department of Veterans Affairs (VA), was denied a promotion. The position went to a woman instead. Gibson filed a complaint with the VA, alleging sex discrimination in violation of Title VII. He sought back pay and a transfer to another VA hospital. The VA issued a decision finding no discrimination. Pet. App. 2a, 16a.

Gibson appealed the decision to the EEOC, which found that the VA had discriminated against him. The EEOC ordered the VA to promote Gibson with back pay. Pet. App. 2a-3a, 16a-17a.

4. Gibson filed suit in federal district court to compel the VA's compliance with the EEOC's order.[6] He also

pecuniary or non-pecuniary loss has been incurred." *Price*, 1996 WL 600763, at *3.

[6] The VA had not acted within the period prescribed by the EEOC to promote Gibson and to calculate his back pay. The EEOC had directed that Gibson be promoted by December 6, 1995, but the VA did not actually promote him until December 23, 1995. The EEOC had directed that Gibson's back pay be calculated by January 5, 1996, and that Gibson be paid by March 5, 1996; in fact, the VA calculated Gibson's back pay on January 29, 1996, and paid him on February 22 and 24, 1996. Gibson filed this action in the district court on January 11, 1996. Pet. App. 16a-17a.

sought compensatory damages—which he had not sought at the administrative level—for alleged "humiliation, mental anguish and emotional distress." Pet. App. 3a-4a, 21a.

The district court dismissed those claims. The court determined that Gibson's claims for promotion and back pay were moot because the VA had by that time fully complied with the EEOC's order. Pet. App. 21-22a, 26a. The court rejected Gibson's claim for compensatory damages on the ground that he had failed to exhaust his administrative remedies by not presenting that claim to the VA and the EEOC. *Id.* at 20a-24a.[7]

5. The court of appeals reversed the dismissal of Gibson's claim for compensatory damages, reasoning that federal employees need not exhaust administrative remedies on such claims. Pet. App. 5a-14a. The court asserted that "exhaustion is not required if [an agency] 'lack[s] authority to grant the type of relief requested.'" *Id.* at 6a (quoting *McCarthy* v. *Madigan*, 503 U.S. 140, 148 (1992)). The court then concluded that the EEOC does not have the authority under Title VII to award compensatory damages against federal agencies. *Id.* at 9a-13a.

The court of appeals conceded that "[n]othing in the statute or regulations explicitly rules out" the EEOC's awarding compensatory damages to federal employees

[7] The court also rejected Gibson's claims for front pay and a job transfer. Pet. App. 24a-25a. The court reasoned that front pay is unwarranted where, as here, the claimant receives the promotion that he was previously denied. *Ibid.* And the court concluded that Gibson had "not even come close to establishing that he is entitled to the extraordinary remedy of a job transfer." *Id.* at 25a. The court did conclude that Gibson was entitled to an award of attorneys' fees, because the VA had not fully complied with the EEOC's order by the time that the suit was filed. *Id.* at 26a-27a.

for violations of Title VII. Pet. App. 6a. The court also acknowledged that "[i]t is not unreasonable to conclude" that the EEOC's statutory mandate to adjudicate Title VII claims against federal agencies "might be broad enough to allow the EEOC to award compensation for mental anguish and emotional distress." *Id.* at 7a. And the court noted that the Fifth Circuit had recently held that the EEOC had the authority to award compensatory damages on Title VII claims arising in the federal sector. *Ibid.* (citing *Fitzgerald* v. *Secretary, United States Dep't of Veterans Affairs*, 121 F.3d 203, 207 (1997)). The court nonetheless held that several factors compelled a contrary conclusion.

The court of appeals principally relied on 42 U.S.C. 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory * * * damages under this section," then "any party may demand a trial by jury." Pet. App. 9a-10a. A "trial by jury" cannot, of course, occur in an administrative proceeding. The court recognized that Section 1981a(c)(1) might be construed to mean that "the EEOC has the right to issue compensatory damages in the first instance, and the losing party may seek de novo review of the damages by demanding a jury trial" in district court. *Id.* at 9a. But the court rejected that construction. The court noted that a federal agency is bound by the EEOC's disposition of a Title VII complaint, although an employee is not and may seek relief de novo in district court. *Id.* at 9a-10a. A federal agency thus could not demand a jury trial to review an EEOC award of compensatory damages to an employee. The court consequently declined to construe Title VII in a manner that would deprive federal agencies of what the court characterized as the "significant procedural right" to a jury trial on compensatory damages claims. *Id.* at 10a.

The court of appeals found further support for its position in the language of 42 U.S.C. 1981a(a)(1), which provides for compensatory damages awards in "an action brought by a complaining party" under, *inter alia*, the statutory provision allowing Title VII claims against the federal government. Pet. App. 10a. The court declined to defer to the EEOC's own construction of Section 1981a(a)(1) as encompassing administrative as well as judicial proceedings. The court concluded that Congress generally used the term "actions" in Title VII to refer to "civil actions filed in federal court, not complaints of discrimination lodged with the EEOC." *Id.* at 11a.

Finally, the court of appeals invoked the principle that any waiver of the federal government's sovereign immunity should be strictly construed. Pet. App. 12a (citing *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981)). The court recognized that Congress has expressly waived the government's sovereign immunity with respect to civil actions for compensatory damages under Title VII. *Id.* at 11a-12a. But the court declined in the absence of a clearer expression of congressional intent "to extend the waiver of sovereign immunity so that the government may be liable for compensatory damages without the benefit of a jury trial." *Id.* at 12a.

The court of appeals remanded Gibson's compensatory damages claim to the district court, "so that it may be tried to a jury, which is what he has demanded in his complaint and what the statute allows." Pet. App. 14a.

SUMMARY OF ARGUMENT

The Equal Employment Opportunity Commission (EEOC) possesses the authority to award compensatory damages against agencies of the federal government for violations of Title VII of the Civil Rights Act

of 1964. That conclusion is supported by the text of the relevant statutory provisions, the legislative history, and the congressional purpose to enable federal employees to obtain full relief at the administrative level for violations of Title VII.

I. Congress has vested the EEOC with broad authority to enforce Title VII in the federal workplace, including the authority to provide all "appropriate remedies" to federal employees who are victims of employment discrimination. 42 U.S.C. 2000e-16(b). And Congress has made clear that the appropriate remedies for violations of Title VII by federal agencies include compensatory damages. 42 U.S.C. 1981a(a)(1). The EEOC itself has recognized since 1992 that compensatory damages are available to federal employees in the administrative process.

A contrary rule would be inconsistent with the statutory requirement that federal employees exhaust administrative remedies with respect to Title VII claims, 42 U.S.C. 2000e-16(c), which was designed to provide a mechanism to resolve such claims fully without resort to the courts. A federal employee still would have to pursue his Title VII claim in the administrative process in order to obtain an award of back pay and equitable relief against his employing agency. But even if the employee fully prevailed in the administrative process, he would then have to go to court to obtain compensatory damages. Such a rule would impose burdens on federal employees, federal agencies, and the federal courts that Congress could not have intended.

Congress has elsewhere evinced its understanding that compensatory damages are among the remedies that may appropriately be awarded in the administrative process for violations of Title VII. In 1991 and again in 1995, as part of comprehensive legislation

extending the protections of Title VII to congressional employees, Congress crafted an administrative enforcement scheme, which was modeled on the existing administrative enforcement scheme for employees of the Executive Branch. Congress made clear that compensatory damages were among the remedies to be available to congressional employees in that administrative enforcement scheme. 2 U.S.C. 1405(g) (Supp. II 1996). Congress must have understood, therefore, that the same remedies were available in the administrative enforcement scheme applicable to employees of federal agencies under 42 U.S.C. 2000e-16.

II. The court of appeals acknowledged in this case that "[n]othing in the statute or regulations explicitly rules out the idea" that the EEOC may award compensatory damages to federal employees in the administrative process. Pet. App. 6a. But the court nonetheless reached a contrary conclusion, based on three reasons that are ultimately unpersuasive.

First, the court of appeals noted that Congress, in 42 U.S.C. 1981a(a)(1), authorized compensatory damages "[i]n an action * * * under section * * * 717 of the Civil Rights Act of 1964," 42 U.S.C. 2000e-16, the provision that extends Title VII to the federal government. The court construed Section 1981a(a)(1) as referring only to civil actions in federal district court. But nowhere did Congress define the term "action" for purposes of Section 1981a(a)(1) in such a narrow manner. The term "action," in context, is broad enough to encompass both administrative and judicial proceedings under Section 2000e-16. And, whether or not administrative proceedings are "actions," Congress, by making compensatory damages available in judicial proceedings, gave the EEOC the authority to award

compensatory damages as an "appropriate remed[y]" in administrative proceedings as well.

Second, the court of appeals relied on 42 U.S.C. 1981a(c)(1), which provides that, "[i]f a complaining party seeks compensatory * * * damages under this section," then "any party may demand a trial by jury." But that provision is most sensibly construed as providing a jury trial right only if an individual's Title VII claim should ripen into a civil action in federal district court. It does not preclude a federal employee from seeking, or the EEOC or an employing federal agency from awarding, compensatory damages in the administrative process. The court of appeals' contrary construction was based on the assumption that Section 1981a(c)(1) was designed to confer "a significant procedural right" on federal agencies and other employers. Pet. App. 10a. But that assumption finds no support in the text or legislative history of Section 1981a(c)(1). Congress could reasonably have concluded that the interests of federal agencies as employers would adequately be served when compensatory damages were awarded by the EEOC or the agency itself rather than by a jury.

Finally, the court of appeals perceived that Congress did not specifically waive the United States' sovereign immunity from Title VII compensatory damages claims in the administrative process. But a sovereign's express waiver of immunity with respect to proceedings in its courts—which the court of appeals conceded occurred here—surely encompasses a waiver of immunity with respect to proceedings in its own administrative agencies. In any event, by granting the EEOC broad authority to award all "appropriate remedies" against federal agencies for violations of Title VII, and by subsequently including compensatory damages among

the remedies available generally under Title VII against all employers including federal agencies, Congress has expressed with sufficient clarity its intent to waive the United States' immunity with respect to Title VII compensatory damages claims in administrative and judicial proceedings alike.

ARGUMENT

THE EEOC HAS THE AUTHORITY TO AWARD COMPENSATORY DAMAGES AGAINST AGENCIES OF THE FEDERAL GOVERNMENT ON CLAIMS OF EMPLOYMENT DISCRIMINATION IN VIOLATION OF TITLE VII

A. The EEOC's Statutory Authority To Enforce Title VII In The Federal Workplace "Through Appropriate Remedies" Includes The Authority To Award Compensatory Damages

Congress has given the EEOC broad authority to resolve, at the administrative level, complaints of employment discrimination against agencies of the federal government. And Congress has required that such complaints initially be pursued at the administrative level. It may reasonably be inferred from that statutory scheme that, once compensatory damages became available in 1991 on claims of employment discrimination against the federal government, the EEOC gained the authority to award such damages at the administrative level. A contrary result would require federal employees to pursue their claims of employment discrimination in two forums—first at the administrative level to determine liability, back pay, and equitable relief, and afterward in federal district court to determine compensatory damages—thereby undermining the statutory exhaustion requirement and complicating

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1. In 1972, Congress extended Title VII's prohibition against employment discrimination on the basis of "race, color, religion, sex, or national origin" to the federal government. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. 2000e-16(a) (1994 & Supp. II 1996)); see *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 825 (1976) ("Until it was amended in 1972 * * * , Title VII did not protect federal employees."). But Title VII was not to apply to the federal government in precisely the same manner that it applied to other employers. Congress crafted a distinct set of "administrative and judicial enforcement mechanisms," *Brown*, 425 U.S. at 831, for claims of employment discrimination asserted by federal employees and applicants for federal employment.[1]

[1] Section 2000(e)-16(a) extends the protections of Title VII to civilian employees or applicants for employment in executive agencies, military departments, the Postal Service, the Postal Rate Commission, the Government Printing Office, the General Accounting Office, the Library of Congress, the Smithsonian Institution, and those units of the judicial branch of the federal government and of the District of Columbia government having positions in the competitive service. 42 U.S.C. 2000e-16(a) (Supp. II 1996); Pub. L. No. 105-220, § 341(a), 112 Stat. 1092.

Congress delegated initially to the Civil Service Commission, and later to the Equal Employment Opportunity Commission (EEOC),[2] the authority to "enforce" Title VII against the federal government "through appropriate remedies, including reinstatement or hiring of employees with or without back pay." 42 U.S.C. 2000e-16(b). At the same time, Congress imposed "certain preconditions," *Brown*, 425 U.S. at 832, on a federal employee's ability to file a civil action in federal district court with respect to a claim of employment discrimination. See 42 U.S.C. 2000e-16(c). Those prerequisites are designed to provide an opportunity for the resolution of an employment-discrimination claim in an administrative process, including "through conference, conciliation, and persuasion[,] before the aggrieved party [is] permitted to file a lawsuit." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

The federal employee first "must seek relief in the agency that has allegedly discriminated against him." *Brown*, 425 U.S. at 832. If the employee is dissatisfied with the agency's disposition of his claim, he may "seek further administrative review with the [EEOC]" or, alternatively, may "file suit in federal district court without appealing to the [EEOC]." *Ibid.* If the employee does appeal to the EEOC, but is dissatisfied with the EEOC's decision, he then may file suit in district court. *Ibid.* An employee also "may file a civil

[2] All responsibility for enforcing equal opportunity in federal employment was transferred to the EEOC from the Civil Service Commission in Reorganization Plan No. 1 of 1978, § 3, 43 Fed. Reg. 19,807 (1978). See 42 U.S.C. 2000e-4 note (1994).

action if, after 180 days from the filing of the charge or the appeal, the agency or [the EEOC] has not taken final action." *Ibid.*

The EEOC has promulgated regulations to govern the administrative processing of claims of employment discrimination against federal agencies. An aggrieved employee first must notify an equal employment opportunity (EEO) counselor at his employing agency of the allegedly discriminatory act. 29 C.F.R. 1614.105(a). If the EEO counselor determines that the matter cannot be resolved informally, the employee is advised of his right to file a formal complaint with the agency. 29 C.F.R. 1614.105(d). The agency is required to conclude "a complete and fair investigation" of the complaint within 180 days unless the parties agree to extend the period. 29 C.F.R. 1614.106(d)(2), 1614.108(e). Once the agency has completed the investigation and provided the employee with a copy of the investigative file, the employee may request a hearing before an EEOC administrative judge or an immediate final decision from the agency. 29 C.F.R. 108(f). If the employee requests a hearing, the administrative judge is required to issue findings of fact and conclusions of law, and to "order appropriate relief where discrimination is found," within 180 days of the hearing request unless good cause exists for extending that time. 29 C.F.R. 1614.109(g). Within 60 days after receiving the administrative judge's decision or the employee's request for a final decision without a hearing, the agency is required to issue a final decision, which "shall consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief." 29 C.F.R. 1614.110.

2. In 1991, Congress authorized awards of compensatory damages in "action[s] brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964." Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, § 102, 105 Stat. 1072 (codified at 42 U.S.C. 1981a(a)(1)). Section 717, 42 U.S.C. 2000e-16, is the provision of the Civil Rights Act of 1964 governing Title VII claims against the federal government, while Section 706, 42 U.S.C. 2000e-5, is the provision governing Title VII claims against other employers. Title VII had previously authorized only back pay and equitable remedies. See 42 U.S.C. 2000e-5(g)(1).[3]

Since 1992, the EEOC has taken the position that "the Civil Rights Act of 1991 * * * makes compensatory damages available to federal sector complainants in the administrative process." *Jackson* v. *United States Postal Serv.*, EEOC Appeal No. 01923399 (Nov. 12, 1992), slip op. 3.[4] The EEOC has announced procedures to ensure that federal agencies include compensatory damages among the "appropriate remedies and relief," 29 C.F.R. 1614.110, awarded to their employees who are found to be victims of discrimination. If an employee indicates during the administrative process that he has sustained damages as a consequence of the alleged discrimination,[5] the agency must request from

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[3] The Civil Rights Act of 1991 also authorized awards of punitive damages in Title VII actions against private employers, but not in those against "a government, government agency or political subdivision." 42 U.S.C. 1981a(b)(1).

[4] See also *Price* v. *United States Postal Serv.*, EEOC Appeal No. 01945860, 1996 WL 600763, at *3 (Oct. 11, 1996); *McCormick* v. *United States Postal Serv.*, EEOC Appeal No. 01954168, 1996 WL 562668, at *2 (Sept. 25, 1996).

[5] The EEOC has made clear that "a complainant need not use legal terms of art such as 'compensatory damages,' but may merely use words or phrases to put the agency on notice that the relevant

the employee "objective evidence that he or she has incurred compensatory damages, and that the damages are related to the alleged unlawful discrimination." *Jackson*, slip op. 3. If the employee presents such evidence, the agency must address the issue of compensatory damages in any decision finding liability. See, *e.g.*, *Taunton* v. *Brown*, EEOC Appeal No. 01943687, 1995 WL 481019, at *4-*5 (Aug. 9, 1995); *Larochelle* v. *Dalton*, EEOC Appeal No. 01934530, 1993 WL 762933, at *2-*3 (Dec. 21, 1993).

3. In 1992, respondent Michael Gibson, an accountant employed by the Department of Veterans Affairs (VA), was denied a promotion. The position went to a woman instead. Gibson filed a complaint with the VA, alleging sex discrimination in violation of Title VII. He sought back pay and a transfer to another VA hospital. The VA issued a decision finding no discrimination. Pet. App. 2a, 16a.

Gibson appealed the decision to the EEOC, which found that the VA had discriminated against him. The EEOC ordered the VA to promote Gibson with back pay. Pet. App. 2a-3a, 16a-17a.

4. Gibson filed suit in federal district court to compel the VA's compliance with the EEOC's order.[6] He also

pecuniary or non-pecuniary loss has been incurred." *Price*, 1996 WL 600763, at *3.

[6] The VA had not acted within the period prescribed by the EEOC to promote Gibson and to calculate his back pay. The EEOC had directed that Gibson be promoted by December 6, 1995, but the VA did not actually promote him until December 23, 1995. The EEOC had directed that Gibson's back pay be calculated by January 5, 1996, and that Gibson be paid by March 5, 1996; in fact, the VA calculated Gibson's back pay on January 29, 1996, and paid him on February 22 and 24, 1996. Gibson filed this action in the district court on January 11, 1996. Pet. App. 16a-17a.

sought compensatory damages—which he had not sought at the administrative level—for alleged "humiliation, mental anguish and emotional distress." Pet. App. 3a-4a, 21a.

The district court dismissed those claims. The court determined that Gibson's claims for promotion and back pay were moot because the VA had by that time fully complied with the EEOC's order. Pet. App. 21-22a, 26a. The court rejected Gibson's claim for compensatory damages on the ground that he had failed to exhaust his administrative remedies by not presenting that claim to the VA and the EEOC. *Id.* at 20a-24a.[7]

5. The court of appeals reversed the dismissal of Gibson's claim for compensatory damages, reasoning that federal employees need not exhaust administrative remedies on such claims. Pet. App. 5a-14a. The court asserted that "exhaustion is not required if [an agency] 'lack[s] authority to grant the type of relief requested.'" *Id.* at 6a (quoting *McCarthy* v. *Madigan*, 503 U.S. 140, 148 (1992)). The court then concluded that the EEOC does not have the authority under Title VII to award compensatory damages against federal agencies. *Id.* at 9a-13a.

The court of appeals conceded that "[n]othing in the statute or regulations explicitly rules out" the EEOC's awarding compensatory damages to federal employees

[7] The court also rejected Gibson's claims for front pay and a job transfer. Pet. App. 24a-25a. The court reasoned that front pay is unwarranted where, as here, the claimant receives the promotion that he was previously denied. *Ibid.* And the court concluded that Gibson had "not even come close to establishing that he is entitled to the extraordinary remedy of a job transfer." *Id.* at 25a. The court did conclude that Gibson was entitled to an award of attorneys' fees, because the VA had not fully complied with the EEOC's order by the time that the suit was filed. *Id.* at 26a-27a.

for violations of Title VII. Pet. App. 6a. The court also acknowledged that "[i]t is not unreasonable to conclude" that the EEOC's statutory mandate to adjudicate Title VII claims against federal agencies "might be broad enough to allow the EEOC to award compensation for mental anguish and emotional distress." *Id.* at 7a. And the court noted that the Fifth Circuit had recently held that the EEOC had the authority to award compensatory damages on Title VII claims arising in the federal sector. *Ibid.* (citing *Fitzgerald* v. *Secretary, United States Dep't of Veterans Affairs*, 121 F.3d 203, 207 (1997)). The court nonetheless held that several factors compelled a contrary conclusion.

The court of appeals principally relied on 42 U.S.C. 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory * * * damages under this section," then "any party may demand a trial by jury." Pet. App. 9a-10a. A "trial by jury" cannot, of course, occur in an administrative proceeding. The court recognized that Section 1981a(c)(1) might be construed to mean that "the EEOC has the right to issue compensatory damages in the first instance, and the losing party may seek de novo review of the damages by demanding a jury trial" in district court. *Id.* at 9a. But the court rejected that construction. The court noted that a federal agency is bound by the EEOC's disposition of a Title VII complaint, although an employee is not and may seek relief de novo in district court. *Id.* at 9a-10a. A federal agency thus could not demand a jury trial to review an EEOC award of compensatory damages to an employee. The court consequently declined to construe Title VII in a manner that would deprive federal agencies of what the court characterized as the "significant procedural right" to a jury trial on compensatory damages claims. *Id.* at 10a.

The court of appeals found further support for its position in the language of 42 U.S.C. 1981a(a)(1), which provides for compensatory damages awards in "an action brought by a complaining party" under, *inter alia*, the statutory provision allowing Title VII claims against the federal government. Pet. App. 10a. The court declined to defer to the EEOC's own construction of Section 1981a(a)(1) as encompassing administrative as well as judicial proceedings. The court concluded that Congress generally used the term "actions" in Title VII to refer to "civil actions filed in federal court, not complaints of discrimination lodged with the EEOC." *Id.* at 11a.

Finally, the court of appeals invoked the principle that any waiver of the federal government's sovereign immunity should be strictly construed. Pet. App. 12a (citing *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981)). The court recognized that Congress has expressly waived the government's sovereign immunity with respect to civil actions for compensatory damages under Title VII. *Id.* at 11a-12a. But the court declined in the absence of a clearer expression of congressional intent "to extend the waiver of sovereign immunity so that the government may be liable for compensatory damages without the benefit of a jury trial." *Id.* at 12a.

The court of appeals remanded Gibson's compensatory damages claim to the district court, "so that it may be tried to a jury, which is what he has demanded in his complaint and what the statute allows." Pet. App. 14a.

SUMMARY OF ARGUMENT

The Equal Employment Opportunity Commission (EEOC) possesses the authority to award compensatory damages against agencies of the federal government for violations of Title VII of the Civil Rights Act

of 1964. That conclusion is supported by the text of the relevant statutory provisions, the legislative history, and the congressional purpose to enable federal employees to obtain full relief at the administrative level for violations of Title VII.

I. Congress has vested the EEOC with broad authority to enforce Title VII in the federal workplace, including the authority to provide all "appropriate remedies" to federal employees who are victims of employment discrimination. 42 U.S.C. 2000e-16(b). And Congress has made clear that the appropriate remedies for violations of Title VII by federal agencies include compensatory damages. 42 U.S.C. 1981a(a)(1). The EEOC itself has recognized since 1992 that compensatory damages are available to federal employees in the administrative process.

A contrary rule would be inconsistent with the statutory requirement that federal employees exhaust administrative remedies with respect to Title VII claims, 42 U.S.C. 2000e-16(c), which was designed to provide a mechanism to resolve such claims fully without resort to the courts. A federal employee still would have to pursue his Title VII claim in the administrative process in order to obtain an award of back pay and equitable relief against his employing agency. But even if the employee fully prevailed in the administrative process, he would then have to go to court to obtain compensatory damages. Such a rule would impose burdens on federal employees, federal agencies, and the federal courts that Congress could not have intended.

Congress has elsewhere evinced its understanding that compensatory damages are among the remedies that may appropriately be awarded in the administrative process for violations of Title VII. In 1991 and again in 1995, as part of comprehensive legislation

extending the protections of Title VII to congressional employees, Congress crafted an administrative enforcement scheme, which was modeled on the existing administrative enforcement scheme for employees of the Executive Branch. Congress made clear that compensatory damages were among the remedies to be available to congressional employees in that administrative enforcement scheme. 2 U.S.C. 1405(g) (Supp. II 1996). Congress must have understood, therefore, that the same remedies were available in the administrative enforcement scheme applicable to employees of federal agencies under 42 U.S.C. 2000e-16.

II. The court of appeals acknowledged in this case that "[n]othing in the statute or regulations explicitly rules out the idea" that the EEOC may award compensatory damages to federal employees in the administrative process. Pet. App. 6a. But the court nonetheless reached a contrary conclusion, based on three reasons that are ultimately unpersuasive.

First, the court of appeals noted that Congress, in 42 U.S.C. 1981a(a)(1), authorized compensatory damages "[i]n an action * * * under section * * * 717 of the Civil Rights Act of 1964," 42 U.S.C. 2000e-16, the provision that extends Title VII to the federal government. The court construed Section 1981a(a)(1) as referring only to civil actions in federal district court. But nowhere did Congress define the term "action" for purposes of Section 1981a(a)(1) in such a narrow manner. The term "action," in context, is broad enough to encompass both administrative and judicial proceedings under Section 2000e-16. And, whether or not administrative proceedings are "actions," Congress, by making compensatory damages available in judicial proceedings, gave the EEOC the authority to award

compensatory damages as an "appropriate remed[y]" in administrative proceedings as well.

Second, the court of appeals relied on 42 U.S.C. 1981a(c)(1), which provides that, "[i]f a complaining party seeks compensatory * * * damages under this section," then "any party may demand a trial by jury." But that provision is most sensibly construed as providing a jury trial right only if an individual's Title VII claim should ripen into a civil action in federal district court. It does not preclude a federal employee from seeking, or the EEOC or an employing federal agency from awarding, compensatory damages in the administrative process. The court of appeals' contrary construction was based on the assumption that Section 1981a(c)(1) was designed to confer "a significant procedural right" on federal agencies and other employers. Pet. App. 10a. But that assumption finds no support in the text or legislative history of Section 1981a(c)(1). Congress could reasonably have concluded that the interests of federal agencies as employers would adequately be served when compensatory damages were awarded by the EEOC or the agency itself rather than by a jury.

Finally, the court of appeals perceived that Congress did not specifically waive the United States' sovereign immunity from Title VII compensatory damages claims in the administrative process. But a sovereign's express waiver of immunity with respect to proceedings in its courts—which the court of appeals conceded occurred here—surely encompasses a waiver of immunity with respect to proceedings in its own administrative agencies. In any event, by granting the EEOC broad authority to award all "appropriate remedies" against federal agencies for violations of Title VII, and by subsequently including compensatory damages among

the remedies available generally under Title VII against all employers including federal agencies, Congress has expressed with sufficient clarity its intent to waive the United States' immunity with respect to Title VII compensatory damages claims in administrative and judicial proceedings alike.

ARGUMENT

THE EEOC HAS THE AUTHORITY TO AWARD COMPENSATORY DAMAGES AGAINST AGENCIES OF THE FEDERAL GOVERNMENT ON CLAIMS OF EMPLOYMENT DISCRIMINATION IN VIOLATION OF TITLE VII

A. The EEOC's Statutory Authority To Enforce Title VII In The Federal Workplace "Through Appropriate Remedies" Includes The Authority To Award Compensatory Damages

Congress has given the EEOC broad authority to resolve, at the administrative level, complaints of employment discrimination against agencies of the federal government. And Congress has required that such complaints initially be pursued at the administrative level. It may reasonably be inferred from that statutory scheme that, once compensatory damages became available in 1991 on claims of employment discrimination against the federal government, the EEOC gained the authority to award such damages at the administrative level. A contrary result would require federal employees to pursue their claims of employment discrimination in two forums—first at the administrative level to determine liability, back pay, and equitable relief, and afterward in federal district court to determine compensatory damages—thereby undermining the statutory exhaustion requirement and complicating

the resolution of such claims both for employees and for the government.

1. Congress has delegated to the EEOC "full authority to enforce" Title VII against the federal government "through *appropriate remedies*, including reinstatement or hiring of employees with or without back pay." *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 831-832 (1976) (quoting 42 U.S.C. 2000e-16(b)) (emphasis added). Congress has further authorized the EEOC to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities" to ensure that federal personnel decisions are "made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a) and (b); see *Fitzgerald* v. *Secretary, United States Dep't of Veterans Affairs*, 121 F.3d 203, 207 (5th Cir. 1997) (noting the EEOC's "wide-ranging authority" under Section 2000e-16(b) to enforce Title VII in the federal sector).

Congress thus did not specify which particular remedies the EEOC may, and may not, award against federal agencies that have violated Title VII. Congress instead vested the EEOC with broad discretion to determine which "remedies," among those authorized by law, are "appropriate" based upon its expertise with regard to employment discrimination generally and in the federal workplace specifically. This Court has repeatedly recognized that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)).

Congress intended that the term "appropriate remedies" in Section 2000e-16(b) would be expansively construed so as to make victims of employment discrimination whole. The Senate Report on the legislation that extended the protections of Title VII to federal employees explained that "[t]hese remedies may include back pay for applicants, as well as employees, denied promotion opportunities, reinstatement, hire, immediate promotion *and any other remedy needed to fully recompense the employee for his loss, both financially and professionally.*" S. Rep. No. 415, 92d Cong., 1st Sess. 45 (1971) (emphasis added).

In 1991, Congress added compensatory damages to the array of remedies available under Title VII against employers, including agencies of the federal government. Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, § 102, 105 Stat. 1072 (codified at 42 U.S.C. 1981a(a)(1)) (authorizing compensatory damages in any "action brought by a complaining party under section * * * 717 of the Civil Rights Act of 1964"—the provision that extended Title VII to the federal government—"against a respondent who engaged in unlawful intentional discrimination"). Nowhere in the text of the Civil Rights Act of 1991 did Congress expressly preclude the EEOC from making the new compensatory damages remedy available to federal employees in administrative proceedings under Title VII. Nor does the legislative history of the 1991 Act contain *any* statement, from *any* member of Congress, that compensatory damages are not to be awarded in such administrative proceedings.[8]

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[8] The legislative history of the Civil Rights Act of 1991 contains no extended discussion of the applicability of the compensatory damages remedy to federal employees. It does, however, include

The EEOC subsequently determined that "the Civil Rights Act of 1991 * * * makes compensatory damages available to federal sector complainants in the administrative process." *Jackson* v. *United States Postal Serv.*, EEOC Appeal No. 01923399 (Nov. 12, 1992), slip op. 3. In making the determination, the EEOC was acting within its congressionally delegated "authority to enforce" Title VII in the federal sector "through appropriate remedies," 42 U.S.C. 2000e-16(b), which necessarily includes the authority to determine which of the "remedies" generally available under Title VII are "appropriate" to be awarded against federal agencies in the administrative process. Congress, by making compensatory damages available in judicial proceedings in the Civil Rights Act of 1991, thus gave the EEOC the authority to award the same relief in administrative proceedings. See *Fitzgerald*, 121 F.3d at 207 (concluding that the EEOC's statutory mandate to enforce the anti-discrimination laws in the federal workplace "is sufficiently broad to allow the EEOC to offer * * * full relief that includes compensatory damages").

2. The conclusion that compensatory damages are among the "appropriate remedies" available in the administrative process is supported by the statutory

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an analysis by the Congressional Budget Office of the costs of the Act to the federal government. The Congressional Budget Office stated that the costs of "administrative settlements" of employment-discrimination claims against the federal government "could increase under the bill because compensatory damages could be awarded in some cases involving the federal government." H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 108 (1991). The statement appears to reflect an understanding that compensatory damages would be available to federal employees in the administrative process.

exhaustion requirement, see 42 U.S.C. 2000e-16(c), which reflects Congress's design to encourage the resolution of employment-discrimination claims against federal agencies at the administrative level.[9] At the time that Congress extended Title VII to the federal government, adopting both the provision that authorizes the EEOC to grant "appropriate remedies" and the provision that requires federal employees to exhaust administrative remedies, Congress understood that those "provisions * * * will enable the Commission to grant *full relief* to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate." S. Rep. No. 415, *supra*, at 16 (emphasis added).[10] An individual would need to file suit in federal district court only if he was "not satisfied with the agency or Commission decision." *Ibid.*

This Court has recognized that a requirement that a claimant exhaust administrative remedies may serve a variety of purposes. See *McKart* v. *United States*, 395 U.S. 185, 194-195 (1969) (enumerating purposes). The exhaustion requirement contained in Section 2000e-16(c) serves at least three of those purposes: It provides the employing agency with "a chance to discover and correct its own errors," *id.* at 195; it enables the EEOC, the entity charged with enforcing the anti-discrimination laws in the federal sector, to "apply its expertise," *id.* at 194; and it serves "practical notions of judicial

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[9] Under Section 2000e-16(c), an employee must first present his Title VII claim to the agency that allegedly discriminated against him. If the employee does not obtain full relief from the agency, he may either appeal to the EEOC or sue in federal district court. He may also go to district court if his EEOC appeal is unsuccessful.

[10] The Senate Report's reference to "the Commission" was to the Civil Service Commission, which initially had the authority to enforce Title VII in the federal sector. See note 2, *supra*.

efficiency" because, if "[a] complaining party [is] successful in vindicating his rights in the administrative process," then "the courts may never have to intervene," *id.* at 195. See *Jordan* v. *United States*, 522 F.2d 1128, 1132 (8th Cir. 1975) (noting purposes served by exhaustion requirement of Section 2000e-16(c)); accord *Tolbert* v. *United States*, 916 F.2d 245, 249 n.1 (5th Cir. 1990).

All of those purposes would be undermined if a federal employee could not recover compensatory damages in the administrative process, whether from his employing agency, in the first instance, or from the EEOC on appeal.[11] An employee who sought equitable relief, back pay, and compensatory damages for a single violation of Title VII then could not obtain full relief at the administrative level. The employee would still, of

[11] While the Seventh Circuit in this case did not expressly address whether an employing agency may award compensatory damages to an employee who has suffered discrimination in violation of Title VII, the Seventh Circuit's rationale could lead to the conclusion that the agency, like the EEOC, has no such authority. In holding that respondent did not violate the administrative exhaustion requirement of Section 2000e-16(c) when he failed to raise his compensatory damages claim before either the VA or the EEOC, the Seventh Circuit apparently assumed that the VA, like the EEOC, could not award such damages and, consequently, that respondent was not required to seek them at either stage of the administrative process. Respondent thus was permitted to assert his compensatory damages claim for the first time in a civil action in federal district court. The Eleventh Circuit, in a decision adopting the Seventh Circuit's rationale in this case, held that an employing agency lacks the authority to act in accordance with "the EEOC's requirement that an agency award an employee discrimination victim compensatory damages where necessary for 'full relief.'" *Crawford* v. *Babbitt*, 148 F.3d 1318, 1325 (1998), petition for cert. pending, No. 98-1332.

course, have to exhaust administrative remedies with respect to his claims for equitable relief and back pay. However, even if the employee entirely prevailed at the administrative level, receiving all of the back pay and equitable relief that he sought, he would have to file suit in district court to pursue his claim for compensatory damages. The agency would be denied the opportunity fully to correct its own errors. The EEOC would be prevented from applying its expertise concerning employment discrimination in the federal workplace, both with respect to specifying the rules that the agency must apply in considering the employee's compensatory damages claim initially and with respect to reviewing the agency's resolution of that claim on any administrative appeal. And the federal courts would inevitably have to intervene in the matter because the employee could never be fully "successful in vindicating his rights in the administrative process." *McKart*, 395 U.S. at 195. It is unlikely that Congress intended to create such a costly, inefficient, and time-consuming procedure for resolving Title VII complaints —a procedure that is contrary to the interests of federal employees, the federal government as employer, and the already overburdened federal courts. See *Fitzgerald*, 121 F.3d at 207 (expressing doubt that "Congress would have created an administrative process capable of providing only partial relief"); *Jackson*, slip op. at 7 (recognizing that such a process could result in "the filing of unnecessary lawsuits").[12]

[12] Cf. *New York Gaslight Club* v. *Carey*, 447 U.S. 54, 65, 66 n.6 (1980) (construing statute authorizing attorneys' fees awards in "proceedings" under Title VII to include state and local proceedings in order to "ensure[] incorporation of state procedures as a meaningful part of the Title VII enforcement scheme" and avoid unnecessary federal proceedings).

According to the EEOC, some 28,947 formal administrative complaints of employment discrimination were filed against federal agencies in fiscal 1997 alone. Office of Federal Operations, EEOC, *Federal Sector Report on Complaints Processing and Appeals by Federal Agencies for Fiscal Year 1997*, at 1 (1998).[13] Such complaints often seek compensatory damages as well as equitable relief. The majority of such complaints are resolved within the agency itself, without the filing of an appeal to the EEOC or a civil action in district court. See *id.* at T-33 (in fiscal 1997, agencies closed 6,252 employment-discrimination cases with corrective action, granting total compensatory damages of $3,723,873). In fiscal 1997, however, the EEOC closed 5,480 appeals of cases raising claims under Title VII, often ordering corrective action, including compensatory damages. *Id.* at T-68; see also, *e.g.*, *Turner* v. *Babbitt*, EEOC Appeal No. 1956390, 1998 WL 223578, at *5-6 (Apr. 27, 1998) (citing administrative appeals in which the EEOC awarded compensatory damages). If the EEOC does not have the authority to award compensatory damages against federal agencies, many such cases could not be closed at the administrative level and instead would reach the federal courts. And if federal agencies likewise cannot award compensatory damages at the first stage of the administrative process (see note 11, *supra*), the number of cases reaching the federal courts would be still greater. It thus could require many years of administrative and judicial proceedings before a federal

[13] The number includes not only claims of discrimination on the basis of race, color, religion, sex, or national origin, within the scope of Title VII, but also claims of discrimination on the basis of age and disability.

employee could ever recover compensatory damages under Title VII.

3. Congress's understanding that the administrative enforcement scheme for Title VII claims against federal agencies includes compensatory damages awards, as well as other "appropriate remedies" that would be available in court, is reflected in Congress's enactment of similar administrative enforcement schemes for Title VII claims against itself. Congress has twice in recent years crafted comprehensive statutory schemes governing Title VII claims by its own employees—in 1991, when Congress extended Title VII to employees of the United States Senate, and in 1995, when Congress extended Title VII to all congressional employees. On both occasions, Congress included compensatory damages among the remedies available to congressional employees in the administrative process. And, on both occasions, Congress recognized that it was creating for its own employees an administrative process that was similar to that already in place for employees of federal agencies.

As part of the Civil Rights Act of 1991, Congress adopted a series of provisions, titled the Government Employee Rights Act, that extended Title VII and other federal anti-discrimination laws to Senate employees. See Civil Rights Act of 1991, Pub. L. No. 102-166, Title III, §§ 301-325, 105 Stat. 1088-1099.[14] Congress provided that Senate personnel actions "shall be made free from any discrimination based on," *inter alia*, "race, color, religion, sex, or national origin, within the

[14] No comparable legislation was adopted at that time with respect to employees of the House of Representatives. The House applied Title VII to itself beginning in 1988 through House Resolution 558 (100th Congress).

meaning of Section 717 of the Civil Rights Act of 1964," the section applicable to personnel actions of the Executive Branch. § 302(1), 105 Stat. 1088. A Senate employee could, for the first time, file a complaint alleging employment discrimination in violation of Title VII, which would be decided by a three-member board of independent hearing officers appointed by an Office of Senate Fair Employment Practices. § 307, 105 Stat. 1091. Congress then provided that "[i]f the hearing board determines that a violation has occurred, it shall order such remedies as would be appropriate if awarded under [42 U.S.C. 2000e-5(g) and (k)]," *i.e.*, equitable relief, back pay, attorneys' fees, and costs, "and may also order the award of such compensatory damages as would be appropriate if awarded under [42 U.S.C. 1981 and 42 U.S.C. 1981a(a) and (b)(2)]." § 307(h), 105 Stat. 1092.[15] Congress contemplated that the authority of the hearing board with respect to Title VII claims of Senate employees—presumably including the authority to award compensatory damages—would be analogous to the authority of the EEOC with respect to Title VII claims of employees of federal agencies. See 137 Cong. Rec. 28,903 (1991) (statement of Sen. Mitchell, co-sponsor) (explaining that the legislation was designed "[t]o give the people who work here in the Senate * * * a process similar to that available to their counterparts in the civil service").

In 1995, Congress adopted more comprehensive legislation that extended the protections of Title VII

[15] The decision of the hearing board was subject to review by the Select Committee on Ethics and the Court of Appeals for the Federal Circuit. §§ 308-309, 105 Stat. 1092-1094. But neither the employee nor his employer had any right to a jury trial on any issue of liability or remedy.

and other federal anti-discrimination statutes to most congressional employees, superseding the 1991 legislation applicable only to Senate employees. Congressional Accountability Act of 1995, Pub. L. No. 104-1, Title I, §§ 101-102, 109 Stat. 4-6 (codified at 2 U.S.C. 1301 *et seq.* (Supp. II 1996)).[16] Under the 1995 Act, a congressional employee, after undergoing mandatory counseling and mediation, may elect to file a complaint either with a newly created Office of Compliance or in federal district court. 2 U.S.C. 1404. If the employee elects to pursue his claim through the administrative process, the Office of Compliance may "order such remedies as are appropriate pursuant to subchapter II of this chapter," which include compensatory damages. 2 U.S.C. 1405(g); see 2 U.S.C. 1311(b)(1)(B) (compensatory damages provision).[17] Again, as in 1991, Congress sought to model its own administrative enforcement scheme for employees' Title VII claims after that of the Executive Branch. See 141 Cong. Rec. 659 (1995) (statement of Sen. Lieberman, co-sponsor) ("this measure we are considering establishes an

[16] All statutory citations to provisions of the Congressional Accountability Act are to the 1996 Supplement.

[17] Either party may appeal the decision of the Office of Compliance to its Board of Directors and subsequently to the Court of Appeals for the Federal Circuit. 2 U.S.C. 1406(a), 1407(a). The standard of review in each instance is a deferential one. 2 U.S.C. 1406(c), 1407(d). Unless the congressional employee elects to pursue his claim in district court, rather than through the administrative process, his employing office has no right to a jury trial, including on the issue of compensatory damages. Cf. 2 U.S.C. 1408(c) (providing jury trial right in district court proceedings).

independent office to function as a legislative branch equivalent of the executive enforcement agencies").[18]

It is thus evident that Congress has perceived nothing untoward in the award in the administrative process of compensatory damages to be paid out of the federal treasury. That is precisely what Congress provided for Title VII claims against itself. Indeed, although Congress chose not to bring itself within the same administrative enforcement scheme as the Executive Branch, apparently out of concern for its own independence, Congress consciously sought to replicate that existing administrative enforcement scheme. Congress must have understood, therefore, that compensatory damages were among the remedies available in that scheme.

---

[18] The administrative enforcement scheme for Title VII claims by employees of federal agencies was already in place in 1991, when compensatory damages were made available generally as a remedy for Title VII violations. In contrast, the administrative enforcement schemes for Title VII claims by Senate employees, in the 1991 legislation, and for all congressional employees, in the 1995 legislation, were created at the same time that compensatory damages were made available as a remedy to those employees. It is thus understandable that the legislation creating the latter schemes expressly mentioned compensatory damages as among the remedies available in the administrative process. The absence of a similar express reference to compensatory damages in 42 U.S.C. 2000e-16, the provision creating the administrative enforcement scheme applicable to federal agencies, does not suggest that Congress did not intend that compensatory damages be available in that scheme. Congress would have recognized that Section 2000e-16(b) already authorized all "appropriate remedies" in the administrative process—a term expansive enough to include compensatory damages once authorized generally by Congress with respect to Title VII claims against all employers, including the federal government.

B. The Court of Appeals' Reasons for Concluding That The EEOC Has No Authority To Award Compensatory Damages In Administrative Proceedings Are Unpersuasive

The court of appeals acknowledged in this case that "[n]othing in the statute or regulations explicitly rules out the idea" that the EEOC may award compensatory damages on Title VII claims in administrative proceedings. Pet. App. 6a. The court nonetheless concluded that the EEOC lacked the authority to do so. None of the three reasons offered by the court to justify that conclusion is persuasive.

1. The court of appeals relied in part on 42 U.S.C. 1981a(a)(1), which states that "[i]n an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] * * * the complaining party may recover compensatory and punitive damages." The court construed that provision to mean that compensatory damages are available "only" in "a civil action" in district court as opposed to in "an administrative proceeding." Pet. App. 10a-11a.

a. Section 1981a does not, however, define the term "action" as being limited to judicial proceedings. The statutory language, read in context, suggests that no such limitation was intended. Section 1981(a)(1) refers to "an action brought by a complaining party under section * * * 717 of the Civil Rights Act of 1964," 42 U.S.C. 2000e-16, the section that authorizes both administrative and judicial proceedings against federal agencies for violations of Title VII. If Congress had meant to refer only to civil actions in district court, Congress presumably would have cited specifically to Section 717(c), 2000e-16(c), the subsection titled "Civil action by employee or applicant for employment for redress of grievances." Section 1981a(d), which defines

a "complaining party" for purposes of Section 1981a(a)(1) as "a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964," provides further indication that Congress did not intend to limit Section 1981a(a)(1) to civil actions in district court.

The reference to Section 717, 42 U.S.C. 2000e-16, was included in the provision that became Section 1981a(a)(1) during the Senate debate on the Civil Rights Act of 1991, as a result of an amendment offered by Senator Warner to "clarify" that the compensatory damages provision applied to federal employees. 137 Cong. Rec. 29,020 (1991). In introducing the amendment, Senator Warner described the process for resolving federal employees' complaints of employment discrimination, including informal counseling, the filing of a formal complaint with the employing agency, review by the EEOC, and a civil action in district court. *Id.* at 29,021. Senator Warner then turned to what he termed "the heart of the matter":

> Remedies available under present law include:
>
> One, reinstatement; two, back pay; three, restoration of benefits; and, four, public notice.
>
> My amendment would add to the list of remedies compensatory damages including those covering pain and suffering, and that is a very important subject.

Ibid. Senator Warner drew no distinction between the remedies available in the administrative process and the remedies available in the judicial process. Nor did any other member of the Senate.

The EEOC's decision in *Jackson*, which concluded that compensatory damages are available at the administrative level, was based, in part, on the EEOC's view that the term "action" in Section 1981a(a)(1) was intended to encompass administrative proceedings. Slip op. 4-7. To be sure, since Congress did not expressly give the EEOC regulatory authority with respect to Section 1981a, as Congress did with respect to Section 2000e-16, the EEOC's interpretation of Section 1981a(a)(1) may not be entitled to *Chevron* deference. But the EEOC's interpretation of Section 1981a(a)(1) is nonetheless a "well-reasoned view[] of the agenc[y] implementing [the] statute" to which the Court "may properly resort for guidance." *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2207 (1998) (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944)).

b. In any event, as discussed in Part I above, the EEOC's authority to award compensatory damages does not turn on whether or not an administrative proceeding is an "action" within the meaning of Section 1981a(a)(1). It is enough that Section 1981a(a)(1) expands the remedies available under Title VII against employers generally, and the federal government specifically, to include compensatory damages. In so doing, Section 1981a(a)(1) gives the EEOC the authority to include compensatory damages among the "appropriate remedies," 42 U.S.C. 2000e-16(b), that may be awarded in administrative proceedings for violations of Title VII. See *Fitzgerald*, 121 F.3d at 207 ("[r]egardless" whether the term "action" in Section 1981a(a)(1) "refers to a district court suit, an administrative proceeding, or both," the EEOC's "mandate, as described in § 2000e-16(b), is sufficiently broad to allow the EEOC to offer * * * compensatory damages for emotional injuries").

In view of the EEOC's broad mandate under Section 2000e-16(b) to enforce Title VII in the federal sector, if Congress had intended that compensatory damages not

be available to federal employees in administrative proceedings, Congress could be expected to have said so expressly. It did not.

2. The court of appeals also rested its decision in this case on 42 U.S.C. 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory or punitive damages under this section," then "any party may demand a trial by jury." The court reasoned that, if the EEOC could award compensatory damages against a federal agency, the agency would be deprived of that statutory right to a jury trial, because agencies are bound by the EEOC's dispositions of Title VII claims. Pet. App. 10a; see 42 U.S.C. 2000e-16(c) (providing for civil actions only by "an employee or applicant for employment" who does not prevail at the administrative level); 29 C.F.R. 1614.504(a) (1996).

a. The court of appeals read too much into the statutory language. Section 1981a(c)(1) is most sensibly construed simply as providing a jury trial right, to either party, if a Title VII claim should ripen into a civil action in district court. But it does not preclude a federal employee from seeking, or the EEOC or an employing federal agency from awarding, compensatory damages on a Title VII claim in the administrative process.[19]

[19] Section 1981a(c)(1) does not state that, *whenever* a complaining party seeks compensatory damages on a Title VII claim, any party may demand a jury trial. It states only that any party may demand a jury trial "[i]f a complaining party seeks compensatory or punitive damages *under this section*"—that is, under 42 U.S.C. 1981a, the section of the Civil Rights Act of 1991 that authorizes compensatory damages "[i]n an action brought by a complaining party" under Title VII. Arguably, at least, a federal employee is not proceeding "under this section," within the meaning of Section 1981a(c)(1), when he seeks compensatory damages in the administrative process; he is instead proceeding under 42 U.S.C. 2000e-16(b), which, as discussed above, gives the EEOC the "authority to enforce" Title VII against federal agencies "through appropriate remedies." Section 1981a does, of course, inform which remedies may appropriately be awarded by the EEOC in the administrative process.

The jury trial right provided to federal agencies by the Civil Rights Act of 1991 is, under that construction of Section 1981a(c)(1), essentially equivalent to the jury trial right provided to Congress itself by the Congressional Accountability Act of 1995. As noted above, a congressional employee has the option to prosecute a Title VII complaint, which may include a claim for compensatory damages, either in an administrative process or in district court. 2 U.S.C. 1404. If the employee elects to proceed in district court, the Congressional Accountability Act states, in terms virtually identical to Section 1981a(c)(1), that "[a]ny party may demand a jury trial." 2 U.S.C. 1408(c). But if the employee elects to pursue his complaint in the administrative process, with ultimate review in the Court of Appeals for the Federal Circuit, neither he nor his congressional employer has any right to a jury trial, including on the issue of compensatory damages.

b. The court of appeals' reliance on Section 1981a(c)(1) is premised on its perception that the provision was designed to confer "a significant procedural right" on federal agencies and other employers. Pet. App. 10a. But Congress itself does not appear to have viewed Section 1981a(c)(1) in that manner.

To the contrary, to the extent that members of Congress addressed the jury trial provision that became Section 1981a(c)(1) during their consideration of the Civil Rights Act of 1991, they portrayed the provision as a benefit to employees and a detriment to em-

ployers.[20] The House Report specifically addressed concerns expressed by employers that juries would award disproportionately high damages to employees in Title VII cases, noting that jury discretion would be constrained by damages caps, by restricting damages to cases of intentional discrimination, and by the "additional check" provided by judges. H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 72 (1991); see 42 U.S.C. 1981a(a)(1), (2) (intent requirement); 42 U.S.C.

[20] See, *e.g.*, 137 Cong. Rec. 29,053-29,054 (1991) (statement of Sen. Wallop) (expressing concern that jury awards in Title VII cases would have an "economically devastating" impact on employers); *id.* at 29,051 (statement of Sen. Leahy) (noting that "[f]or the first time, women and the disabled could recover damages and have jury trials for claims of intentional discrimination" as a result of the legislation); *id.* at 29,041 (statement of Sen. Bumpers) (acknowledging employers' concerns about "being exposed to a runaway jury"); *id.* at 29,030 (statement of Sen. Symms) (asserting that "huge monetary award amounts are encouraged through jury trials"); *id.* at 29,021-29,022 (statement of Sen. Wirth) (stating that legislation "laid aside the misguided idea of denying women from having a jury determine whether or not they have been wronged"); *id.* at 28,926 (statement of Sen. Heflin) (describing provision as "allow[ing] jury trials for victims of sexual bias").

See also, *e.g.*, 137 Cong. Rec. 30,690 (1991) (statement of Rep. Dixon) (describing provision as "permit[ting] jury trials for victims of bias"); *id.* at 30,677 (statement of Rep. Hyde) (expressing concern that provision would operate to the detriment of employers); *id.* at 30,668 (statement of Rep. Ford) (describing provision as "providing all victims of intentional discrimination a right to trial by jury"); *id.* at 30,644 (statement of Rep. Doolittle) (describing various provisions of legislation, including "jury trials" provision, as creating "a tremendous injustice and burden to any employer").

All of those quoted, other than Senators Wallop and Symms and Representative Doolittle, ultimately voted in favor of the legislation.

1981a(b)(3) (damages caps).[21] President Bush, in signing the Civil Rights Act of 1991, also expressed the view that the jury trial provision, in particular, was an "important source of the controversy that delayed enactment of this legislation," which was resolved only by placing caps on the damages that juries could award against employers. *Statement of President George Bush Upon Signing S. 1745*, 27 Weekly Comp. Pres. Doc. 1701 (Nov. 25, 1991). No similar concerns were expressed that juries might, out of sympathy for employers, award disproportionately low damages in Title VII cases.

The perception that jury trials in employment-discrimination cases tend to be beneficial to employees, and detrimental to employers, is generally shared by legal scholars, practitioners, and employers. In 1989, for example, Professor Eisenberg noted, based on data compiled by the Administrative Office of the United States Courts for the period 1979 to 1987, "the abysmal success rate of plaintiffs in employment-discrimination cases tried before judges (19.2%), a rate less than one-half that of employment trials before juries." Theodore

[21] The jury trial provision of the Civil Rights Act of 1991, as well as the predecessor legislation that was vetoed by President Bush in 1990, was generally opposed by employer interests. See, *e.g.*, *Civil Rights Act of 1991: Hearings on H.R. 1 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 125-126 (1991) (representative of the National Association of Manufacturers and the Society for Human Resource Management); 2 *Hearings on H.R. 4000, The Civil Rights Act of 1990: Joint Hearings Before the House Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 126-130 (1990) (representative of the U.S. Chamber of Commerce); *id.* at 221-223 (representative of the National Retail Federation).

Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 Geo. L.J. 1567, 1597 (1989). Professor Eisenberg relied on some of the same data in subsequently testifying before Congress in favor of the jury trial and compensatory and punitive damages provisions of the Civil Rights Act of 1991. 2 *Hearings on H.R. 4000, The Civil Rights Act of 1990: Joint Hearings Before the House Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 154-155 (1990) (noting that plaintiffs' success rate in employment-discrimination cases tried to juries was 39%).[22]

[22] See also, *e.g.*, John J. Ross, *The Employment-Law Year in Review (1991-1992)*, 441 PLI Litig. & Admin. Practice Course Handbook Series 7, 13 (1992) ("From an employer's viewpoint many believe the availability of jury trials, under Title VII and the Americans with Disabilities Act, is the most troubling aspect of the Civil Rights Act of 1991."); accord Rachel H. Yarkon, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 Harv. Negotiation L. Rev. 165, 174-175 (1997) ("The 1991 Act increased potential liability for employers * * * by creating the right to a jury trial."); Donna M. Gitter, *French Criminalization of Racial Employment Discrimination Compared to the Imposition of Civil Penalties in the United States*, 15 Comp. Lab. L.J. 488, 521 (1994) (observing that "judges in the United States are perceived as less likely than a lay jury to be sympathetic to and deliver a verdict in favor of a plaintiff" in an employment-discrimination case); Sharlene A. McEvoy, *The Umpire Strikes Out: Postema v. National League: Major League Gender Discrimination*, 11 U. Miami Ent. & Sports L. Rev. 1, 25 (1993) ("Jury trials are viewed as being harder for employers to win than trials heard by judges, because juries generally consist of peers of the employee."); Mary Kathryn Lynch, *The Equal Employment Opportunity Commission: Comments on the Agency and Its Role in Employment Discrimination Law*, 20 Ga. J. Int'l & Comp. L. 89, 103 (1990) ("Juries are now seen to be more sympathetic to Title VII claimants than are the judges.").

Congress could thus have concluded that federal agencies did not need, and would not want, a jury trial right on all claims for compensatory damages under Title VII—a right that would preclude many such claims from being fully resolved at the administrative level without resort to the courts. Congress could instead have decided that the EEOC, with its expertise in adjudicating Title VII claims in the federal sector, would provide agencies sufficient protection against unwarranted damages claims.

3. The court of appeals also rested its decision in this case on the view that Congress did not specifically waive the United States' sovereign immunity from compensatory damages awards by the EEOC. Pet. App. 11a-12a. The court correctly recognized the well-settled rule that "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army* v. *Blue Fox, Inc.*, 119 S. Ct. 687, 691 (1999); accord *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) ("limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied"). But the court did not correctly apply that rule to the circumstances of this case.

Tne court of appeals acknowledged that Congress has waived the United States' immunity with respect to compensatory damages claims in Title VII actions in district court. Pet. App. 11a-12a; see 42 U.S.C. 1981a(a)(1). Indeed, the court noted that Congress has even consented, on behalf of the United States, to the trial of such claims before a jury, at the demand of the plaintiff. Pet. App. 12a; see 42 U.S.C. 1981a(c)(1). The

only question that remains, therefore, is whether such a waiver extends to administrative proceedings before the EEOC. The court offered no authority or logic for concluding that a waiver of a sovereign's immunity, which indisputably applies in the sovereign's courts, should not also presumptively apply in the sovereign's administrative agencies. Such agencies could be expected to accord the sovereign's interests at least as much consideration as would a judge or a jury.

Here, moreover, Congress has expressly granted the EEOC broad adjudicatory authority over claims against the United States under Title VII, including the authority to award all "appropriate remedies" with respect to such claims. 42 U.S.C. 2000e-16(b). Those remedies have historically included monetary ones (*e.g.*, "back pay") as well as equitable ones (*e.g.*, "reinstatement or hiring"). *Ibid.* Accordingly, Section 1981a(a)(1) and Section 2000e-16(b), construed together, express with sufficient clarity Congress's intent to waive the United States' sovereign immunity with respect to all Title VII compensatory damages awards, in administrative and judicial proceedings alike.[23]

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[23] A waiver of sovereign immunity that encompasses both judicial and administrative proceedings is coextensive with the waiver of sovereign immunity in the Congressional Accountability Act of 1995, which expressly makes compensatory damages available to congressional employees in administrative proceedings as well as judicial proceedings. See pp. 22-24, *supra*. Such a waiver of sovereign immunity is also consistent with that in the Government Employee Rights Act, a portion of the Civil Rights Act of 1991, which expressly made compensatory damages available to Senate employees in administrative proceedings. It would be anomalous for Congress to have waived sovereign immunity with respect to administrative proceedings involving congressional employees but not to have waived sovereign immunity with respect to administrative proceedings involving employees of federal agencies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 98-238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TOGO D. WEST, JR., SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

Petitioner,

v.

MICHAEL GIBSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a federal employee's complaint for compensatory damages pursuant to Section 102 of the Civil Rights Act of 1991 should be dismissed for failure to exhaust administrative remedies because he did not use magic words at an earlier stage.

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EEOC, *Federal Sector Report on EEO Complaints Processing and Appeals by Federal Agencies for Fiscal Year 1996* 28

B. Lindemann and P. Grossman, *Employment Discrimination Law* (3d ed. 1996) 31

L. Riley, *Assessing Compensatory Damages Claims in EEOC Cases* 38

Black's Law Dictionary (6th ed. 1990) 13

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 137 F.3d 992. The opinion of the district court (Pet. App. 15a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1998. A petition for rehearing was denied on May 7, 1998. (Pet. App. 29a.) A petition for a writ of certiorari was filed on August 5, 1998, and was granted on January 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title 42 of the United States Code are set forth in the appendix to the petition.

STATEMENT OF THE CASE

Respondent Michael Gibson has been a federal employee since 1977, first in the Armed Forces and then for the petitioner Department of Veterans Affairs. (R.22, Plaintiff's Response to Defendant's Rule 12(M) Statement, Exhibit A, p.1 (hereinafter "Gibson Affidavit").) In 1988, Gibson became an accountant for the VA in Albuquerque, and in 1989, he transferred to a facility in Phoenix. (R.22, Gibson Affidavit, p.1.) In July of 1990, Gibson transferred to the VA Supply Depot in Hines, Illinois, as a GS 9 accountant. (R.22, Gibson Affidavit, p.1.)

In 1992, Gibson applied for a GS 11/12 Supervisory Accountant position which was advertised nationally through the VA. (R.22, Gibson Affidavit, p.1.) The two federal employees who were making the decision concerning the promotion, the chief and the assistant chief of the fiscal division, both female, passed over Gibson to promote a far less experienced female to the GS 11/12 position. (R.22, Gibson Affidavit, pp.1-2.) Gibson filed a timely EEO complaint in December of 1992. (Jt. App. 23-24.)

Gibson discussed his complaint with an EEO counselor for the VA, but the counselor never advised Gibson that he could receive damages for mental and emotional distress based on the VA's intentional discrimination. (R.22, Gibson Affidavit, p.2.) Gibson filled out the EEO complaint form, identifying himself as the complainant, the facility involved, and the actions or practices forming the basis for his complaint. (Jt. App. 23.) The complaint form had a box asking what "corrective action" the complainant was seeking, and Gibson wrote "GS 11 backpay, transfer to VA Hines Hospital, or other hospital of my choice." (Jt. App. 23.)

In the course of administrative proceedings, an EEO investigator asked Gibson what he wanted to settle the case, and Gibson responded, in part, "Monetary cash award. . . ." (R.25, Defendant's Reply to Plaintiff's Rule 12(N) Statement, Exhibit 2, p. 13.) The VA found no discrimination, and Gibson took a timely appeal to the EEOC. (Jt. App. 30-32.) While Gibson's EEO complaint was pending in the VA and the EEOC, the Supply Depot at Hines closed. (R.22, Gibson Affidavit, p.4.) Federal employees at the Supply Depot, including Gibson, were entitled to reassignment at other facilities on

favorable terms. (R.22, Gibson Affidavit, p.4.) Gibson applied for reassignment back in Albuquerque, but was rejected, at least in part due to the perception that he had stagnated at GS 9. (R.22, Gibson Affidavit, pp.4-5.)

For three years, Gibson worked under the employee who had been promoted past him, and he continued to report to the two supervisors who had discriminated against him. (R.22, Gibson Affidavit, p.5.) Gibson's stomach was tied in knots, and he laid awake nights worrying about his employment situation. (R.22, Gibson Affidavit, p.5.) On October 6, 1995, the EEOC issued its final decision finding that Gibson's supervisors had discriminated against him based on sex. (Jt. App. 30-51.) The EEOC ordered the VA to promote Gibson within 30 days, calculate backpay and interest within 60 days, and pay Gibson within 60 days thereafter. (Jt. App. 43-44.)

After the EEOC decision, Gibson hired an attorney to negotiate a settlement with the VA. (R.22, Gibson Affidavit, p.6.) As of January 11, 1996, the 90th day after his receipt of the EEOC decision, Gibson had received no calculation of backpay or interest, and had received no response to his settlement offers. (R.22, Gibson Affidavit, p.6.) On January 11, 1996, Gibson filed his complaint in federal district court seeking enforcement of the EEOC decision and additional relief not awarded by the EEOC. (Jt. App. 25-29.) Gibson alleged that he had suffered humiliation, mental anguish and emotional distress as a result of the VA's intentional discrimination, and he requested a jury trial as to compensatory damages. (Jt. App. 28-29.)

The VA filed a motion to dismiss or in the alternative for summary judgment, arguing that Gibson had failed

to exhaust his administrative remedies with respect to his request for compensatory damages, and that the VA had complied with the EEOC decision, mooting Gibson's enforcement claims. (R.14, Memorandum, pp. 1-8.) Gibson responded, agreeing that the VA had complied with the EEOC decision, but arguing that the VA's failure to comply timely forced Gibson to file suit. (R.21, Response Memorandum, pp. 18-20.)

With respect to the exhaustion doctrine, Gibson argued that he had followed all the procedures applicable to an employment discrimination claim, but had not been compensated for his pain and humiliation. (R.21, Response Memorandum, pp. 6-12.) Gibson argued further that the VA and the EEOC had made no provision for awards of general compensatory damages at the administrative level, and that the EEO counselor who advised Gibson had failed to mention his right to seek such damages. (R.21, Response Memorandum, pp. 12-16.)

On October 2, 1996, the district court issued its memorandum opinion and order, granting in part and denying in part the VA's motion. (Pet. App. 15a-28a.) The court found that Gibson failed to exhaust his administrative remedies with respect to his request for compensatory damages, and that the VA had complied with the EEOC decision, but only after Gibson was required to file suit. (Pet. App. 20a-27a.) The court entered judgment in favor of the VA against Gibson as to all claims except Gibson's request for attorney's fees, and found no just reason for delay. (R.29, Judgment.) Gibson filed a timely notice of appeal. (R.31, Notice of Appeal.)

The court of appeals reversed, reasoning that administrative awards of compensatory damages were inconsistent with the plain language of the Civil Right Act of 1991, 42 U.S.C. § 1981a. (Pet. App. 8a-9a.) The court of appeals rejected the notion that EEOC could award compensatory damages in the first instance subject to *de novo* review: "Not only would that be expensively duplicative, but . . . the statutory scheme promulgated by Congress does not allow the EEOC to issue what would be nonappealable awards of compensatory damages." (Pet. App. 9a.) In so ruling, the Seventh Circuit declined to follow *Fitzgerald v. Secretary, Veterans Affairs,* 121 F.3d 203 (5th Cir. 1997). (Pet. App. 10a.)

The Seventh Circuit gave three reasons for its conclusion. First, under the EEOC's approach, the right to a jury trial was lost, and the jury trial provision of the statute was nullified. (Pet. App. 10a.) The *Fitzgerald* court never addressed the jury trial issue, because the parties never raised it. (Pet. App. 10a.) Second, the statute conferred the right to a jury trial in "an action" as opposed to "a proceeding" which, in the context of Title VII, clearly referred to civil actions in federal district court, not EEOC proceedings. (Pet. App. 10a-11a.) Third, Congress had, by "clear expression," limited its waiver of sovereign immunity to actions in court where the parties had the right to trial by jury. (Pet. App. 12a-13a.).

The Seventh Circuit stated:

> In concluding that EEOC may not order the government to pay compensatory damages, we recognize the EEOC's responsibility to issue any orders it deems "necessary and appropriate." We are not displacing any right that the EEOC his-

> torically has enjoyed. We simply conclude that Congress has determined it is inappropriate for the EEOC to order the government to pay compensatory damages, a right which it never had in the first place.

(Pet. App. 13a.)

SUMMARY OF THE ARGUMENT

With respect to awards of compensatory damages in federal employment discrimination cases, Congress limited its waiver of sovereign immunity to actions in federal district court in which any party may demand a trial by jury. A waiver of sovereign immunity cannot be implied but must be unequivocally expressed, and limitations and conditions upon a waiver of sovereign immunity must be strictly observed. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981). Congress has not unequivocally expressed a waiver of sovereign immunity from compensatory damages at the administrative level, and the award of such damages by the EEOC would violate the explicit conditions which Congress has placed on its waiver.

Section 717 of the Civil Rights Act of 1964 waived sovereign immunity only as to equitable remedies. Section 102 of the Civil Rights Act of 1991 waived sovereign immunity only as to awards of compensatory damages in federal district court where any party may demand a jury trial. The EEOC may not extend these waivers by implication to administrative awards of compensatory damages, and the EEOC may not interpret out of existence a jury trial right which Congress clearly expressed.

Assuming *arguendo* that the EEOC did have authority to award compensatory damages, respondent submits that the judgment of the court of appeals should be affirmed on alternate grounds. Undisputed facts demonstrate that Mike Gibson exhausted his administrative remedies, and undisputed facts further demonstrate that petitioner should be estopped from asserting the bar of exhaustion. The Court should affirm the judgment of the court of appeals.

ARGUMENT

I.

CONGRESS HAS NOT WAIVED SOVEREIGN IMMUNITY FROM AWARDS OF COMPENSATORY DAMAGES IN ADMINISTRATIVE PROCEEDINGS UNDER TITLE VII

It is now well settled that a waiver of sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). Legislative history cannot supply the required unequivocal expression, *Lane v. Pena*, 518 U.S. at 192, nor can a waiver of sovereign immunity be found in the general purposes of a statute, *United States v. Testan*, 424 U.S. 392, 399-400 (1976), or in the policy concerns underlying the statute. *Library of Congress v. Shaw*, 478 U.S. 310, 320-21 (1986). Executive officials cannot waive the Government's sovereign immunity. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-14 (1940).

Moreover, waivers of sovereign immunity must be "construed strictly in favor of the sovereign," *McMahon*

c. *United States*, 342 U.S. 25, 27 (1951), and not enlarged beyond what the language of the statute requires, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). Specifically, the "limitations and conditions upon which the Government consents to be sued must be strictly construed and exceptions thereto are not to be implied," *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957), and when confronted with a purported waiver of sovereign immunity, the Court will construe ambiguities in favor of immunity, *United States v. Williams*, 514 U.S. 527, 531 (1995).

Neither Section 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, nor Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, contains an express waiver of sovereign immunity from compensatory damages in administrative proceedings. To the contrary, the waiver of sovereign immunity in Section 717 is limited to equitable relief, and the waiver of sovereign immunity in Section 102 is limited to actions in which any party may demand a trial by jury. Aside from impermissible reliance on legislative history and agency interpretation, petitioner's argument must be rejected because it turns the law of sovereign immunity on its head: Petitioner's argument relies on a broad construction of the waivers at issue, it reads limitations on the waivers out of existence, and it construes ambiguities against immunity.

Ultimately, the Government's position fails the unequivocal expression test and endorses an implied waiver of sovereign immunity.

A. Section 717 of the Civil Rights Act of 1964 does not provide the unequivocal statement required to accomplish a waiver of sovereign immunity from administrative awards of compensatory damages

Section 717 was added to Title VII of the Civil Rights Act of 1964 by Section 11 of the Equal Employment Opportunity Act of 1972. Pub.L. No. 92-261 § 11, Mar. 24, 1972, 86 Stat. 111, 42 U.S.C. § 2000e-16 (hereinafter "Section 717"). Briefly, Section 717(a) proscribes discrimination in federal employment; Sections 717(b) and (c) "establish complementary administrative and judicial enforcement mechanisms designed to eradicate federal employment discrimination;" Section 717(d) incorporates Section 706(f) through (k) of the Act, which "govern such issues as venue, the appointment of attorneys, attorneys' fees, and the scope of relief;" and Section 717(e) preserves the "primary responsibility" of each agency for nondiscrimination in employment. *Brown v. General Services Administration*, 425 U.S. 820, 831-32 (1976); 42 U.S.C. § 2000e-16; 42 U.S.C. § 2000e-5(f)-(k).

In Section 717, Congress expressly waived sovereign immunity only as to equitable remedies. Congress did not, as petitioner suggests, delegate a standardless authority to enforce Title VII through appropriate remedies (Petitioner's Brief, p. 13); rather, Congress delegated the "authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section. . . ." 42 U.S.C. § 2000e-16(b) (emphasis added). This delegation consciously echoed and nar-

rowed the judicial remedies provision of Section 706(g), stating that

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1) (emphasis added).

The authority delegated by Congress to the Commission (then the Civil Service Commission, now the EEOC) was commensurate with and explicitly tied to "the policies of this section," which were to eradicate discrimination and "make whole" victims. See generally *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-21 (1975) (discussing remedial purposes of Title VII, legislative history of Equal Employment Opportunity Act of 1972, and the origin and nature of "make whole" relief); see also *id.*, at 442-46 (Rehnquist, J., concurring) (distinguishing backpay from compensatory damages).

Prior to 1991, Title VII was overwhelmingly interpreted to permit awards of equitable relief, but not compensatory or punitive damages. *Landgraf v. USI Film Products*, 511 U.S. 244, 252-53 (1994); *United States v. Burke*, 504 U.S. 229, 238-39 (1992); *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 374-76 (1979); *Brown v. General Services Administration*, 425 U.S. 820, 833-35 (1976); see also *Richerson v. Jones*, 551 F.2d 918, 926-28 (3d Cir. 1977).

Congress did not delegate to the EEOC discretion to determine which "remedies" were "appropriate" in the abstract: Congress decided the type of remedies available to the EEOC, and it delegated discretion to determine which equitable remedies were appropriate in particular cases. In an ordinary statutory construction case, the analysis would begin with the terms of the statute, and if the terms were plain and unambiguous, the analysis would end there as well. *Hughes Aircraft Co. v. Jacobson*, ___ U.S. ___, 119 S.Ct. 755, 760 (1999). Here, Section 717 plainly and unambiguously provides for equitable remedies only, and so further analysis is unwarranted.

But the issue here is whether Congress waived sovereign immunity for the purposes of compensatory damage awards at the administrative level. Therefore, Section 717 must be construed strictly in favor of the sovereign, the waiver must not be enlarged beyond what the language requires, and ambiguities must be interpreted as preserving immunity. Section 717 does not waive sovereign immunity from awards of compensatory damages.

B. Section 102 of the Civil Rights Act of 1991 does not provide the unequivocal statement required to accomplish a waiver of sovereign immunity from administrative awards of compensatory damages

In the Civil Rights Act of 1991, Congress did not amend the administrative delegation in Section 717(b) of the 1964 Act, nor did it alter the "equitable relief" language of Section 706(g), the judicial remedy provision of Title VII; instead, Congress added a new section after 42 U.S.C. § 1981, creating a limited right to compensatory and punitive damages in cases of intentional discrimination not cognizable under Section 1981. Pub.

L. No. 102-166 § 102, Nov. 21, 1991, 105 Stat. 1071, 42 U.S.C. § 1981a (hereinafter "Section 102"). Briefly, Section 102 of the 1991 Act provides, in subsection (a), for the right to compensatory damages; in subsection (b), for limitations and exclusions from the amounts of damages awarded; in subsection (c), for the right to a jury trial; and in subsection (d), for definitions. 42 U.S.C. § 1981a. See *Landgraf v. USI Film Products*, 511 U.S. 244, 252-53, 282-83 (1994) (discussing new right to compensatory damages and jury trial).

In Section 102, Congress expressly waived sovereign immunity only as to awards of compensatory damages in court. Congress did not, as petitioner suggests, authorize the EEOC to award compensatory damages (Petitioner's Brief, p. 15); rather, Congress conferred a right to recover compensatory damages "In an action . . . under section 717 . . . in addition to any relief authorized by section 706(g)," 42 U.S.C. § 1981a(a)(1). Congress further provided that

> If a complaining party seeks compensatory or punitive damages under this section –
>
> (1) any party may demand a trial by jury; and
>
> (2) the court shall not inform the jury of the limitations described in subsection (b)(3).

42 U.S.C. § 1981a(c). Section 102 cannot plausibly be read to authorize compensatory damage awards against the Government at the administrative level.

Initially, Congress expressly authorized compensatory damages "[i]n an action. . . ." 42 U.S.C. § 1981a(a)(1). In the context of compensatory damages, "action" refers to a lawsuit in court. The "[t]erm in its usual legal

sense means a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law." *Black's Law Dictionary* (6th ed. 1990) 28. Further, Congress did not authorize compensatory damages in just any action, but in "an action brought by a complaining party under Section 706 or 717 of the" 1964 Act. 42 U.S.C. § 1981a(a)(1). The only "action" described in these sections is the "civil action" authorized by Section 706(f) and Section 717(c). 42 U.S.C. § 2000e-5(f); 42 U.S.C. § 2000e-16(c).

Congress demonstrated an awareness that complaining parties could bring "an action or proceeding under title VII," 42 U.S.C. § 1981a(d)(1)(A) (emphasis added), but Congress authorized compensatory damages "in an action," not in a proceeding, 42 U.S.C. § 1981a(a)(1). A review of Sections 706 and 717 of the 1964 Act reveals that "action" generally refers to judicial or civil actions, not to administrative proceedings, and that "proceedings" generally refers to state and local or administrative charges, not to lawsuits in federal court. 42 U.S.C. § 2000e-5; 42 U.S.C. § 2000e-16.[1] Thus, the ordinary meaning of the words and the context of the statutes indicate that Congress authorized compensatory damage awards in civil actions, not in administrative proceedings.

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[1] In *New York Gaslight Club v. Carey*, 447 U.S. 54, 60-62 (1980), the Court considered the phrase "action or proceeding" in the context of attorney's fees under Title VII, and concluded that "action" referred to "court actions," and "proceedings" referred more generally to state and local or administrative charges.

The structure of the statutes makes the reference to "civil actions" in sections 706 and 717 even more explicit. Section 102 grants the right to recover compensatory damages in an action under Section 706 or 717 "in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964. . . ." 42 U.S.C. § 1981a(a)(1). Section 706(g), in turn, describes the remedies available, not in an administrative proceeding, but from "the court" in a civil action authorized by Section 706(f). 42 U.S.C. § 2000e-5(f) and (g). Section 717(d) specifically incorporates Section 706(g), not for the purpose of administrative enforcement under Section 717(b), but for the purpose of "civil actions" authorized by Section 717(c). 42 U.S.C. § 2000e-16(c) and (d).

By granting the right to compensatory damages "in an action" under Section 717 "in addition to any relief authorized by Section 706(g)," Section 102 explicitly refers to civil actions under Section 717(c), not administrative proceedings under Section 717(b). Congress did not grant the right to compensatory damages "in addition to any relief authorized by Section 717(b)." The administrative delegation in Section 717(b) refers to rules, regulations, orders and instructions, it provides for review of agency plans, for training, education and consultation, but it does not mention any "action" in the sense of an adversarial hearing at all. 42 U.S.C. § 2000e-16(b).[2]

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[2] Indeed, Congress did not necessarily prescribe an adjudicative process at the administrative level. In addition to its other powers, the EEOC could, consistent with its delegation, rely on conciliation and voluntary compliance rather than adversary proceedings. *See, e.g., Alexander v. Gardner-Denver* (continued...)

When it passed the Civil Rights Act of 1991, Congress amended Sections 706 and 717, see Pub.L. No. 102-166 §§ 107(b) and 114, Nov. 21, 1991, 105 Stat. 1075, 1079, 42 U.S.C. §§ 2000e-5(g) and 2000e-16(d), but it made no change to or mention of the administrative delegation in Section 717(b). Congress expressly authorized awards of compensatory damages in actions arising under the "regulations implementing" Section 501 of the Rehabilitation Act, 42 U.S.C. § 1981a(a)(2), but Congress did not authorize compensatory damage awards in actions or proceedings under the regulations implementing Section 717 of the 1964 Act. Based on the ordinary meaning of the word "action," and the context and structure of Section 102 of the 1991 Act and Sections 706 and 717 of the 1964 Act, it is clear that Congress authorized awards of compensatory damages in federal court, not in administrative proceedings.

Finally, it is clear that Congress authorized compensatory damage awards only in court because Congress bestowed a right to trial by jury, further providing that "the court" should not inform the jury of damage caps. 42 U.S.C. § 1981a(c). Of course, neither a federal employee nor a federal agency may obtain a jury trial in

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[2] (...continued)
Co., 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance were selected as the preferred means" for eradicating discrimination); *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) ("a suit is privately oriented and narrow, rather than broad in application, as successful conciliation tends to be"). In a conciliation model, the "final action taken" by an agency would be an offer aimed at resolution of the charge of discrimination. The complaining party could then accept the offer, resolving the issue, or reject the offer and file an action in federal district court.

the EEOC. See 29 C.F.R., Part 1614 (no procedure for demanding or obtaining trial by jury). And when a federal employee receives a compensatory damage award from the EEOC, the federal agency may not obtain a trial by jury at all because Section 717(c) confers no right upon the agency to file a civil action. 42 U.S.C. § 2000e-16(c).

As this Court has observed:

> The right of trial by jury is of ancient origin, characterized by Blackstone as "the glory of the English law" and "the most transcendent" privilege which any subject can enjoy" (Bk.3, p. 379). . . . [T]rial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care.

Dimick v. Schiedt, 293 U.S. 474, 485-86 (1935). The right to a jury trial is no less important because it arises under a statute as opposed to the common law. *Jacob v. City of New York*, 315 U.S. 752, 753 (1942). In addition to its importance to the parties involved, the right to trial by jury serves a public interest in that "jury trials will expose a broader segment of the populace to the example of federal civil rights laws in operation." *Curtis v. Loether*, 415 U.S. 189, 198 (1974).

In Section 102 of the Civil Rights Act of 1991, Congress committed the assessment of compensatory damages to the jury system, not to any administrative

procedure: "Just as they have for hundreds of years, juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately. . . ." H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt.1, at 72 (1991). Juries are the acknowledged experts in the individualized assessment of compensatory damages. *See, e.g., Nydam v. Lennerton*, 948 F.2d 808, 811 (1st Cir. 1991) ("Translating legal damages into money damages . . . is a matter peculiarly within a jury's ken").[3]

By ensuring that compensatory damages could be awarded only in an action where "any party may demand a trial by jury," 42 U.S.C. § 1981a(c)(1), Congress clearly and unambiguously limited its waiver of immunity from such awards to civil actions in federal district court. This waiver must be "strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Administrative proceedings on compensatory damages violate the unmistakable mandate of Congress by depriving federal agencies of the right to a trial by jury, and by delaying federal employees from the exercise of their right to a trial by jury. Section 102 does not waive sovereign immunity from administrative awards of compensatory damages.

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[3] See also *American National Bank & Trust Co. v. Regional Transportation Authority*, 125 F.3d 420 (7th Cir. 1997) ("a jury has wide discretion in determining damages"); *Brooks v. Great Lakes Dredge-Dock Co.*, 754 F.2d 539, 541 (5th Cir. 1985) ("nature, character and extent of injury are questions for the jury"); *Vanskike v. Union Pacific Railroad Co.*, 725 F.2d 1146 (8th Cir. 1984) (comparison of verdicts is unhelpful because cases and juries are unique).

C. Petitioner's arguments fail the unequivocal expression test

1. The linchpin of the Government's argument is that Congress waived sovereign immunity for the purpose of administrative awards of compensatory damages when it delegated to EEOC "authority to enforce . . . through appropriate remedies." (Petitioner's Brief, pp. 14-16.) These few words will not bear the weight which petitioner has placed on them. As previously noted, the fuller context of Section 717(b) states that the EEOC "shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section. . . ." 42 U.S.C. § 2000e-16(b). This provision does not waive sovereign immunity for the purposes of compensatory damage awards at the administrative level.

By its terms, the "authority to enforce" is limited to subsection (a), which proscribes discrimination in federal personnel decisions. 42 U.S.C. § 2000e-16(a). This limitation corresponds with the primary objective of Title VII at the time Section 717 was enacted, namely, "to assure equality of employment opportunity by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). And the phrase "through appropriate remedies" is described as "including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section."

This latter description corresponds with the secondary purpose of Title VII at the time, which was to "make

persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). But "make whole" relief had nothing to do with compensating victims of discrimination for their "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3). "Make whole" relief was aimed at the "economic character" of discrimination, modeled on the provisions of the National Labor Relations Act which provided a backpay remedy for unfair labor practices. *Albemarle, supra*, at 418-19.

Together, these clauses meant that the EEOC and the courts would have "full authority" to "eradicate federal employment discrimination" and "make whole" victims through injunctive, backpay and other equitable relief. *Brown v. General Services Administration*, 425 U.S. 820, 831 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). See also *United States v. Burke*, 504 U.S. 229, 240 (1992) ("Indeed, the circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other antidiscrimination statutes as well"). Thus, Section 717(b) did not vest EEOC with "broad discretion to determine which 'remedies' among those authorized by law are 'appropriate'" (Petitioner's Brief, p. 14), it delegated authority to determine which discretionary (that is, equitable) remedies should be awarded in a particular case.

A comparison of Section 717(c) with Section 706(g), the judicial enforcement provision, confirms that the delegation was in the nature of equitable discretion, not remedial license. Section 706(g) parallels Section 717(c),

but the judicial delegation is broader, allowing "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief the court deems appropriate." 42 U.S.C. § 2000e-5(g) (emphasis added). Both provisions delegate authority to fashion equitable relief in particular cases; neither provision delegates discretion to determine what remedies are appropriate in the abstract.

Petitioner construes the terms of Section 717(b) broadly to conclude that "Congress, by making compensatory damages available in judicial proceedings in the Civil Rights Act of 1991, thus gave EEOC the authority to award the same relief in administrative proceedings." (Petitioner's Brief, p. 16.) But this Court requires waivers of sovereign immunity to be strictly construed, and not enlarged beyond what the language of the statute requires. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). And if Section 717(b) is ambiguous, if the statute can plausibly be read to waive sovereign immunity only as to equitable remedies, then the ambiguity should be construed in favor of immunity. *Lane v. Pena*, 518 U.S. 187, 200 (1996).

Petitioner concedes that "Congress . . . did not specify which particular remedies the EEOC may, and may not award," but petitioner argues that EEOC has the power to "fill any gap." (Petitioner's Brief, p. 14.) But this Court has held that only Congress may waive sovereign immunity, that the waiver must be unequivocally expressed and not implied, and that Executive officials cannot waive sovereign immunity. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-14 (1940).

Since Congress has not unequivocally expressed a waiver of immunity from administrative awards of compensatory damages, no such waiver may be implied, and whatever power EEOC has to fill a gap with respect to general antidiscrimination law, no federal agency may fill a gap in Congress' waiver of sovereign immunity.

2. As Section 102 of the 1991 Act demonstrates, Congress retained the power to determine what remedies were appropriate in the field of employment discrimination. And when Congress conferred the right to compensatory damages, it placed limitations and conditions on the right which apply to all compensatory damage cases. "[T]his Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957). Petitioner's argument nullifies the limitations and conditions of Section 102 of the Civil Rights Act of 1991.

Conceding that the text and the legislative history of Section 102 are silent with respect to the availability of compensatory damages in administrative proceedings,[4]

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[4] Petitioner points to an estimate by the Congressional Budget Office that the costs of "administrative settlements" could increase, and petitioner infers an "understanding" that compensatory damages would be available at the administrative level. (Petitioner's Brief, pp. 15-16 n.8.) No such "understanding" could be inferred, because federal agencies may be expected to settle compensatory damage claims during the administrative process, in anticipation of litigation. The CBO made no estimate of the cost of administrative awards, and concluded that the increase in settlement costs would be

(continued...)

petitioner nonetheless argues that Congress did not "expressly preclude" such awards. (Petitioner's Brief, p. 15.) This argument cannot withstand statutory analysis. Section 102 expressly creates the right to compensatory damages "[i]n an action . . . under Section . . . 717 . . . in addition to any relief authorized by Section 706(g)." 42 U.S.C. § 1981a(a)(1). For reasons already discussed, this language unambiguously refers to civil actions in federal district court, not administrative proceedings. And the right to trial by jury is antithetical to administrative awards.

Petitioner asserts that the right to a jury trial "is most sensibly construed" as providing that "if a Title VII claim should ripen into a civil action," then any party may demand a trial by jury. (Petitioner's Brief, p. 28.) But the right to a jury trial is tied to a party seeking compensatory damages, not to a request for damages ripening into a civil action. In a footnote, petitioner suggests that Section 102(c) only provides for jury trials "under this section," not under Section 717(b). (Petitioner's Brief, pp. 28-29 n. 19.) But Section 102 is the section which provides a right to compensatory damages for federal employees, and Congress has conditioned this Section 102 right on the right to trial by jury.

The Government's position necessarily implies that the EEOC may select the limitations and conditions that will apply at the administrative level. This approach arrogates to EEOC not only the power to waive

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[4] (...continued)
insignificant. H.R.Rep. No. 40, 102nd Cong., 1st Sess. Pt. 1, at 108 (1991).

sovereign immunity where Congress has remained silent, but also the power to disregard limitations and conditions upon a waiver of sovereign immunity where Congress has spoken. Petitioner argues at length that juries favor employees, and that Congress could have concluded that federal agencies would be better off with the protection of EEOC expertise than with a right to trial by jury. (Petitioner's Brief, pp. 29-33.) Respondent believes that the less said about this argument, the better. Suffice it to say that Congress provided the right to trial by jury for "any party," and Congress conferred the status of defendant on the heads of federal agencies, not the EEOC. 42 U.S.C. § 2000e-16(c).

3. Petitioner relies on *Jackson v. United States Postal Service,* EEOC Appeal No. 01923399 (Nov. 12, 1992), arguing that this Court should show at least some deference to the EEOC's "well-reasoned view." (Petitioner's Brief, pp. 16, 26-27.) The reasoning in *Jackson* is seriously flawed, and the EEOC's conclusion is incorrect: the *Jackson* opinion is entitled to no deference. Among other flaws, the EEOC wholly failed to address sovereign immunity, the right to trial by jury, and the statutory reference to Section 706(g), concerning judicial remedies.

Contrary to petitioner's suggestion, the EEOC did not reason that compensatory damages came within the Commission's authority under Section 717(b), rather, the EEOC concluded that Section 102 applied to administrative proceedings. *Jackson,* slip op. 3.[5] The EEOC

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[5] Petitioner now concedes that "Congress did not expressly give EEOC regulatory authority with respect to Section 1981a." (Petitioner's Brief, p. 27.)

supported this conclusion on two legs: (1) that the word "action" included actions arising out of the "regulations implementing" Section 501 of the Rehabilitation Act, and (2) that "complaining party" was defined with reference to an "action or proceeding." *Jackson*, slip op. 5-6. Neither leg supports the EEOC's conclusion.

With respect to the first leg of its reasoning, the EEOC recognized that Congress had not provided for compensatory damages in actions arising out of the "regulations implementing" Title VII, a potentially fatal difference between subsections (a)(1) and (a)(2) of Section 102. *Jackson*, slip op. 5. The Commission attributed the difference to the fact that Section 717 explicitly provides for an administrative complaint process whereas "section 501 of the Rehabilitation Act lacks such a provision." Slip op. 5. But the Rehabilitation Act expressly incorporates the "remedies, procedures, and rights set forth in section 717" for the purpose of "any complaint" under Section 501, see 29 U.S.C. § 794a(a)(1), and so the EEOC's explanation makes no sense.

With respect to the second leg of *Jackson's* reasoning, the EEOC pointed to *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980), in which the Court approved an award of attorney's fees for work performed at the administrative level, since Section 706(k) allowed such awards "in any action or proceeding." In *Jackson*, the EEOC failed to recognize that while Section 102 defined "complaining party" with reference to an "action or proceeding," the operative language of the statute conferred the right to compensatory damages in "an action," not a proceeding. *Jackson*, slip op. 6-7; 42 U.S.C. § 1981a(a)(1). The EEOC erred in its interpretation of Section 102 of the Civil Rights Act of 1991.

4. The passage of the Government Employee Rights Act, Pub. L. No. 102-166, Title III, §§ 301-325, 105 Stat. 1088-99, and the Congressional Accountability Act of 1995, Pub. L. No. 104-1, Title I, §§ 101-02, 109 Stat. 4-6, 2 U.S.C. § 1301 *et seq.* (Supp. II 1996), demonstrate that Congress knows how to unequivocally express a waiver of sovereign immunity at the administrative level. In Section 307(h) of the Government Employee Rights Act, Congress specifically authorized

> such remedies as would be appropriate if awarded under section 706(g) and (k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g) and (k)), and may also order the award of such compensatory damages as would be appropriate if awarded under section 1977 and section 1977A(a) and (b)(2) of the Revised Statutes (42 U.S.C. 1981 and 1981A(a) and (b)(2)).

Pub. L. No. 102-166, Title III, § 307(h), 105 Stat. 1092.

In the Government Employee Rights Act, Congress specifically waived sovereign immunity for the purpose of equitable remedies, attorney's fees and compensatory damages, and further specified that these remedies could be awarded by a hearing board with no right to a jury trial. Pub. L. No. 102-166, Title III, § 307, 105 Stat. 1091-92. The clarity and specificity of this waiver of sovereign immunity stands in stark contrast to the indirect and internally contradictory waiver of sovereign immunity advanced by petitioner in this case. The contrast is heightened by the inclusion of the Government Employee Rights Act in the Civil Rights Act of 1991.

Aside from their dissimilarity in terms of the waiver of sovereign immunity, the enforcement scheme under

the Government Employee Rights Act was very different from the Title VII enforcement scheme. The statute applied to Senate employees, was administered by a Senate Office with no regulatory authority, provided for closed hearings, Senate oversight and deferential review by the Court of Appeals for the Federal Circuit. Pub. L. No. 102-166, Title III, §§ 302-03, 307(d)(1), 308-09, 105 Stat. 1088-94. Senator Mitchell may have intended to design a process similar to the civil service process (see Petitioner's Brief, p. 22), but the reality of the Government Employee Rights Act was quite different.

Similarly, the Congressional Accountability Act of 1995 contained a clear textual waiver of sovereign immunity with respect to equitable remedies under Section 706(g), and compensatory damages under Section 1981 or 1981a. 2 U.S.C. § 1311(b)(1). In the Congressional Accountability Act, Congress delegated no regulatory authority concerning discrimination claims, and provided for an election procedure whereby an employee could choose an administrative path with deferential review in the Court of Appeals, or a judicial path in federal district court. 2 U.S.C. §§ 1401-08. Congress included a provision for jury trials in civil actions, but not in the administrative process. 2 U.S.C. § 1408(c).

Again, the contrast between the clear waiver of sovereign immunity under the Congressional Accountability Act and the purported waiver advanced by petitioner in this case is striking. In the Congressional Accountability Act, Congress unequivocally expressed a waiver of compensatory damages at the administrative level and conditioned the right to compensatory damages on the

right to trial by jury only on the judicial pathway. Again, whatever Senator Lieberman may have intended with respect to the similarity of enforcement agencies (see Petitioner's Brief, pp. 23-24), it is clear that the Congressional Accountability Act bears little resemblance to Title VII.

5. That Congress limited compensatory damage awards to actions in federal court will not significantly undermine the administrative exhaustion requirement. Petitioner claims that three purposes of the exhaustion requirement would be undermined: (1) The agency's ability to correct its own errors, (2) The EEOC's ability to apply its expertise, and (3) The judicial economy in pre-suit resolution. (Petitioner's Brief, pp. 17-19.) The first interest is substantial, but it is not impaired by limiting compensatory damage awards to actions in federal court. Agencies will still have every opportunity to correct their own errors in the administrative process, before a civil action is filed. If an agency anticipates liability for compensatory damages, it may correct its error by offering a settlement.[6]

The second interest is less substantial, but minimally impaired. The EEOC will still have every opportunity to apply its expertise with respect to employment discrimination and equitable remedies. But the EEOC has

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[6] Sovereign immunity does not preclude a voluntary settlement in anticipation of a future liability. *Crawford v. Babbitt*, 148 F.2d 1318, 1326 (11th Cir. 1998); *see also Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (sovereign has power to contract); *Holmes v. Department of Veterans Affairs*, 58 F.3d 628, 632 (Fed. Cir. 1995) (settlement agreement is a contract).

no particular expertise in the field of compensatory damages. Juries are the experts when it comes to assessing compensatory damages, and for this reason, Congress committed this remedy to the jury system. The EEOC will continue to play an important role in conciliation and voluntary settlement of compensatory damage claims, but not at the expense of the parties' right to be heard in federal court.

The third interest is also substantial, but will be impaired only to the extent necessary to secure the parties' rights. Petitioner raises the specter of thousands of cases haunting the federal courts. (Petitioner's Brief, p. 20.) Although the Report cited in petitioner's brief is not yet available to the public, there is reason to believe that the numbers are not large. In fiscal year 1996, the last year for which statistics are generally available, there were 26,410 EEO complaints filed against federal agencies. EEOC, *Federal Sector Report on EEO Complaints Processing and Appeals by Federal Agencies for Fiscal Year 1996*, at T-3 (1997). More than one-third of that number, 8,904 were dismissed, and another one-third, 8,483 were withdrawn or settled. *Id.*, at T-27.

Of the 7,763 complaints that were decided by agencies, more than 60% were decided without hearings, and less than 40% required hearings. *Id.*, at T-30. There were 8,961 closures with corrective action, but this number includes both settlements and awards, and it includes corrective actions both with and without backpay. *Id.*, at 44. There were 3,429 closures with corrective action and backpay. *Id.* The EEOC does not report the number of compensatory damage awards or

settlements, but the dollar amount for compensatory damages was about half of the dollar amount for backpay. *Id.*, at T-33. Based on the numbers the EEOC has made available, the pool of potential litigants does not seem too large.

Congress considered and rejected the argument that making compensatory damages available in court would "open the floodgates" and undermine the goal of voluntary settlement. H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 70-73. For example, anecdotal and statistical evidence indicated that victims of employment discrimination who had access to both Title VII and Section 1981 remedies continued to use Title VII's conciliation process, and had about the same settlement rate as others. *Id.*, p. 73. Given the size of awards in employment discrimination suits, the likelihood of success, and the effort and expense involved in suing one's employer, the danger of frivolous lawsuits seemed to the majority to be remote. *Id.*, at 70-72.

In any event, a waiver of sovereign immunity cannot be found in the policy considerations underlying a statute. *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986). "It may well be . . . that routine trials *de novo* in the federal courts will tend ultimately to defeat rather than to advance the basic purposes of the statutory scheme. But Congress has made the choice, and it is not for us to disturb it." *Chandler v. Roudebush*, 425 U.S. 840, 863-64 (1976). See also *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) ("But these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies").

II.

THE COURT SHOULD AFFIRM THE SEVENTH CIRCUIT ON ALTERNATE GROUNDS APPEARING IN THE RECORD

Assuming *arguendo* that the EEOC has authority to award compensatory damages, the Court should affirm the judgment of the Seventh Circuit because the record affirmatively reveals that Mike Gibson exhausted his administrative remedies. A respondent may assert any matter in support of his judgment, even though it may involve an attack upon the reasoning of the lower court, or insistence on matters overlooked or ignored, so long as the ground appears in the record. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). "[A] prevailing party, without cross-petitioning, is entitled under our precedents to urge any grounds which lend support to the judgment below." *United States v. X-Citement Video, Inc*, 513 U.S. 64, 78 (1994) quoting *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977).

Section 102 of the Civil Rights Act of 1991 provides that an employee has the right to a jury trial on his employment discrimination claim, even if the employer is the federal government. Mike Gibson exercised his rights, followed all the rules, complied fully with EEOC rules, regulations, and instructions. After receiving less than full relief, Gibson properly pursued his claim in federal court. The EEOC cannot now argue that Gibson failed to use magic words and is barred from filing suit in federal court.

A. The Supreme Court should affirm the decision by the Seventh Circuit because Gibson exhausted his administrative remedies

What constitutes exhaustion of administrative relief has not been clearly addressed. It appears that exhaustion encompasses a timely filed complaint containing certain factual allegations, presented to and investigated by the EEOC as part of the EEOC complaint process, and also requires the applicant's cooperation with the process.[7] Gibson submits that existing federal law, together with EEOC rules, support his contention that specific factual pleading of a particular category of damages is not required for exhaustion.

It is established that the remedy flows from the claim asserted, and a request for relief may be amended at any time during the administrative process without restriction. *Carlson v. Secretary of the Navy*, EEOC Request No. 05930480, 1994 WL 735488 (Apr. 26, 1994); *Sloan v. U.S. Postal Service*, EEOC Petition No. 03940166, 1995 WL 62723 (Feb. 9, 1995). Since the agency may pursue any form of relief as it relates to the discriminatory act of which Gibson gave written notice, Gibson did not fail to exhaust his administrative remedies by not specifically requesting "compensatory damages."

There is no authority that permits the VA to bar Gibson from pursuing his claim in federal court for

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[7] Barbara Lindemann and Paul Grossman, *Employment Discrimination Law* 57 (3d ed. 1996); *see also Wade v. Secretary of the Army*, 796 F.2d 1369, 1377 (11th Cir. 1986) ("Good faith effort by the employee to cooperate with the agency . . . and to provide all relevant, available information is all that exhaustion requires.").

failing to request a specific category of damages. Moreover, the imposition of a fact pleading requirement with respect to injuries at the administrative level would run counter to settled law holding that Title VII procedures should be accessible to lay people. *Love v. The Pullman Co.*, 404 U.S. 522, 527 (1972) ("Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process").

One purpose of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975). Section 102 of the Civil Rights Act of 1991 authorizes compensatory damages for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-pecuniary losses" experienced by victims of intentional discrimination. 42 U.S.C. § 1981a(b)(3). In addition, Federal Rule Civil Procedure 54(c) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Fed. R. Civ. P. 54(c).

Consistent with these general rules, the EEOC regulations require both the employing agency and the EEOC to provide victims of discrimination "full relief" regardless of what the complainant writes in the "corrective action" box on the initial EEO complaint form. See 29 C.F.R. § 1614.501 and Appendix A to Part 1613. The EEOC regulation which covers the filing of EEO complaints only requires precise information as to the identities of the parties and the factual basis for

the claim; the regulation is silent as to requests for relief. 29 C.F.R. § 1614.106(c).

Indeed, the EEO complaint form at the heart of the VA's argument does not ask what injuries the complainant suffered. (Jt. App. 23-24.) Gibson's original EEO complaint specifically identified the person claiming to be aggrieved, the agency that allegedly discriminated against him, and the actions or practices forming the basis for his complaint. These are the only mandatory contents of an EEO complaint. See 29 C.F.R. § 1614.106 (Jt. App. 61-62.) The instructions on the back of the complaint form emphasize the importance of detail in describing the discriminatory conduct (Blocks 8 and 9), but the instructions are silent as to "corrective action" (Block 10). (Jt. App. 24.) Clearly, the EEOC was not bound by Gibson's request for relief in this case, and, in fact, the EEOC awarded a promotion which Gibson failed to request. (Jt. App. 23, 43.)

Furthermore, during the investigation of his case, Gibson requested a "monetary cash award." (R. 25, Reply to Gibson's Rule 12(N) Statement, Exhibit 2, p. 13.) In a nearly identical case, the EEOC held that a request for "appropriate monetary award" was a request for compensatory damages sufficient to trigger the agency's duty to investigate. *Price v. U.S. Postal Service,* EEOC Request No. 05950480, 97 FEOR 3031, 1996 WL 600763, at *6-7 (Oct. 11, 1996).[8] In *Price*, the

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[8] EEOC case law supports that this demand is consistent with a request for compensatory damages. "The Commission has held that a complainant need not use legal terms of art such as 'compensatory damages,' but may merely use words or

(continued...)

EEOC reversed a dismissal based on an offer of full relief because the complainant had requested compensatory damages:

> The record, however, contains no evidence that appellant was ever asked to provide evidence substantiating her claim for compensatory damages. As previously noted, appellant, in her request for counseling, indicated that she was seeking an "appropriate monetary reward." The Commission interprets said statement to be a request for compensatory damages. Therefore, since appellant raised a claim for compensatory damages in her request for counseling, we find that the agency should have requested objective evidence of the alleged damages incurred and evidence that the damages were linked to the alleged unlawful discrimination prior to making its certified offer. *See* Jackson v. USPS, EEOC Appeal No. 01923399 (November 12, 1992), *request to reconsider denied*, EEOC Request No. 05930306 (February 1, 1993).

Id.

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[8] (...continued)
phrases to put the agency on notice that the relevant pecuniary or non-pecuniary loss has been incurred." *Price v. U.S. Postal Service*, EEOC Request No. 05950480, 97 FEOR 3031, 1996 WL 600763, at *7 (Oct. 11, 1996); *see also Haynes v. U.S. Postal Service*, EEOC Request No. 05920891, 94 FEOR 3168, 1993 WL 762904 (December 14, 1993); *Fiandaca v. Department of the Navy*, EEOC No. 01943264, 96 FEOR 3012, at XII-43, XI-46 n.3, 1995 WL 577063 (Sept. 21, 1995), *request to reconsider denied*, EEOC Request No. 05960069, 1997 WL 40386 (Jan. 24, 1997). A complainant's request during EEO counseling for a cash settlement of $300 was sufficient to make a claim for compensatory damages in one instance. *See Zurcher v. U.S. Postal Service*, EEOC No. 01945859, 95 FEOR 1176, at XI-168 to XI-169, 1995 WL 9592 (February 28, 1995) (reversing dismissal of complaint for mootness and remanding for further processing because agency failed to request objective evidence of damages and linkage after complainant requested cash settlement).

Petitioner suggests that this inquiry is foreclosed by the law of the case doctrine. (Petitioner's Reply Brief on Certiorari Petition at p. 2.) The law of the case, however, cannot bind this Court in reviewing decisions below. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988).

Once the agency is put on notice of facts that may justify an award of compensatory damages, the burden then shifts to the employing agency to investigate the claim for compensatory damages. *Fitzgerald v. Department of Veterans Affairs*, 121 F.3d 203, 208 (5th Cir. 1997). Under the EEOC's rules, if a demand for "appropriate monetary reward" is sufficient to place the EEOC on notice, certainly a request for "monetary cash award" would likewise place the EEOC on notice that a claim may justify an award of compensatory damages. To hold otherwise would defeat Congressional intent that Title VII should be accessible to the lay person.

But even if Gibson did not request general compensatory damages at the administrative level, he nonetheless exhausted his administrative remedies. Gibson's request for relief was not the essence of his claim. Gibson's "claim" comprised the factual allegations of unlawful discrimination. Gibson exhausted the administrative process with respect to his claim of intentional discrimination by timely filing his complaint, which was presented to and investigated by the EEOC. *See, e.g., EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 898-99 (9th

Cir. 1994) (The EEOC's investigation of the agency-level complaint, which was reasonably related to the judicial claim, exhausted administrative remedies for the employee.)

Gibson's complaint in this case is based on the same discriminatory conduct as his EEO charge, and on damages growing out of that charge. Gibson has made no separate claim of harassment or retaliation or intentional infliction of emotional distress, only a related claim that he suffered humiliation and mental anguish as a result of the original discrimination, being required to work for the person who was promoted over him and the two supervisors who discriminated against him. Gibson seeks precisely the kind of general compensatory damages authorized by Section 102. 42 U.S.C. § 1981a.

Gibson exhausted his administrative remedies, but he did not receive full relief. Title VII should not be construed to require claimants seeking compensatory damages to separately grieve every instance of emotional pain and loss of enjoyment of life they experience, while their original claim of discrimination is pending. To impose such a requirement would limit the award of general compensatory damages only to the most inveterate complainers.

Having concluded that Gibson was a victim of intentional discrimination, the EEOC was required by law to provide "full" and "appropriate" relief. 42 U.S.C. § 2000e-5(g) (incorporated at 42 U.S.C. § 2000e-16(d)); 29 C.F.R. § 1614.501 and Appendix A to Part 1613. If the EEOC has authority to award compensatory damages at the administrative level, EEOC failed to grant

such relief to Gibson. 42 U.S.C. § 1981a. Gibson was aggrieved by the final decision of the EEOC, and so he was entitled to file suit in federal court seeking these damages. 42 U.S.C. § 2000e-16(c); 42 U.S.C. § 1981a. The judgment of the court of appeals should be affirmed on this alternate ground, or the case should be remanded for further consideration.

B. The petitioner should be estopped from raising the bar of exhaustion of administrative remedies by having breached its affirmative obligation to advise Gibson of his right to compensatory damages

It is settled law that in Title VII cases, the exhaustion requirement is subject to the doctrines of waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Although *Zipes* involved an employment suit against a private defendant, this Court subsequently held that the same presumption of equitable tolling applied to suits in federal employment cases. *See Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 95-96 (1991) ("We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States"). Gibson submits that the VA should be estopped from asserting exhaustion by its failure to advise Gibson of his right to request compensatory damages.

The regulations promulgated by the EEOC impose an affirmative duty upon EEO counselors to "advise individuals in writing of their rights and responsibilities" in connection with EEO complaints. 29 C.F.R.

§ 1614.105(b). The regulations further require the EEOC to review agency resources and procedures periodically to ensure that agencies are giving complainants sufficient notice of their rights. 29 C.F.R. § 1614.104(b). Gibson spoke with an EEO counselor for the VA prior to filling out his EEO complaint, but he was not advised of his right to receive general compensatory damages. (R.22, Plaintiff's Response to Defendant's Rule 12 (M) Statement, p.3 and Exhibit A, p. 2.)

Lucinda A. Riley, in her book entitled *Assessing Compensatory Damages Claims in Federal EEO Cases* points out that the issue of what a complainant must allege to raise a claim of compensatory damages has generated much administrative litigation in the federal sector since the passage of the Civil Rights Act of 1991.[9] She comments:

> Initially, federal agencies challenged and resisted the imposition of compensatory damages in the administrative process. Additionally, many agencies, intentionally or negligently, failed to notify complainants of their rights to compensatory damages. Some agencies opined that if the complainant failed to initially raise such claims, their later requests would be barred, so the less said, the better. Underpinning their concerns was the agencies' fear that if the complainants were notified of their rights, they might assert them.[10]

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[9] Lucinda A. Riley, *Assessing Compensatory Damages Claims in Federal EEO Cases* 49 (LRP Pub. 1998).

[10] *Id.*

Respondent cannot say whether the VA's failure to advise Gibson was intentional or negligent. But the regulations explicitly place the burden on the VA to advise Gibson and to investigate the facts to determine whether Gibson was entitled to compensatory damages. Having breached its duties to advise and investigate, the VA is estopped from asserting the bar of exhaustion.

Title VII was amended in 1972 to extend the protections of the Civil Rights Act to federal employees; courts have accordingly striven to afford federal employees the same procedural and substantive rights as private employees. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). One of the specific evils addressed by extending Title VII to federal employees was the "defense of . . . failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies." *Brown v. General Services Administration*, 425 U.S. at 827-28.

The VA had an affirmative duty to advise Gibson of his rights and to investigate his compensatory damage claim. Undisputed facts demonstrate that the VA did not advise Gibson of his right to general compensatory damages, and the VA did not investigate his damages. The VA cannot equitably benefit from the breach of its duty to advise Gibson of his rights and to investigate his damages by cutting off those rights. The Court should hold that the VA is estopped from asserting an exhaustion defense in this case, and affirm the judgment of the court of appeals, or remand for further consideration.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed or remanded.

Respectfully submitted,

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(9)

No. 98-238

In the Supreme Court of the United States

OCTOBER TERM, 1998

TOGO D. WEST, JR., SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, PETITIONER

v.

MICHAEL GIBSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-238

TOGO D. WEST, JR., SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, PETITIONER

v.

MICHAEL GIBSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

A. Congress has authorized the EEOC to award compensatory damages as an "appropriate remed[y]" for employment discrimination by federal agencies

Two statutory provisions, read together, evince Congress's intent that the Equal Employment Opportunity Commission (EEOC) be able to award compensatory damages against the federal government for employment discrimination in violation of Title VII. The earlier enacted provision, 42 U.S.C. 2000e-16(b), grants the EEOC the "authority to enforce * * * through appropriate remedies" Congress's directive, in 42 U.S.C. 2000e-16(a) (Supp. II 1996), that "[a]ll personnel actions" of the federal government "shall be made free

from any discrimination based on race, color, religion, sex, or national origin." It also grants the EEOC the authority to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate" to carry out that directive. The more recently enacted provision, 42 U.S.C. 1981a(a)(1), authorizes the award of compensatory damages in "action[s]" against the federal government for employment discrimination in violation of Section 2000e-16.

It makes no difference whether either provision, read in isolation, would confer such authority on the EEOC.[1] Statutory provisions "must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Congress did not specify in Section 2000e-16(b) the universe of "remedies" that are "appropriate" for the EEOC to award in the administrative process. Congress must therefore have contemplated that the EEOC and the courts would look to the "overall statutory scheme" of which Section 2000e-16(b) is a part in order to give content to the term "appropriate remedies." Cf. *Ruckelshaus* v. *Sierra Club*, 463 U.S.

[1] Respondent thus errs in asserting (Br. 18) that "[t]he linchpin of the Government's argument is that Congress waived sovereign immunity for the purpose of administrative awards of compensatory damages when it delegated to EEOC 'authority to enforce . . . through appropriate remedies.'" We do not argue that Congress waived the government's sovereign immunity with respect to administrative awards of compensatory damages in *1972*, when Congress adopted the provision authorizing the Civil Service Commission, and subsequently the EEOC, to award "appropriate remedies" for violations of Title VII by federal agencies. We instead contend that Congress waived such sovereign immunity in *1991*, when Congress authorized awards of compensatory damages against federal agencies for violations of Title VII.

680, 683 (1983) (explaining that construing a statute authorizing attorneys' fees awards where "appropriate," a term that was not further defined in the statute, "requires reference to other sources"). Congress must also have recognized that the scope of "appropriate remedies" would not necessarily remain fixed over time, but could change as the remedies available against the federal government in the "overall statutory scheme" expanded or contracted. Accordingly, once Congress made compensatory damages available in the Civil Rights Act of 1991 as a remedy against federal agencies (and other employers) for violations of Title VII, Congress must have understood that it was likewise expanding the universe of "appropriate remedies" that the EEOC could award against federal agencies in the administrative process.

1. Respondent asserts (Br. 11) that Section 2000e-16(b) "plainly and unambiguously provides for equitable remedies only" in the administrative process. But nothing in the text of Section 2000e-16(b) purports to restrict the "appropriate remedies" that the EEOC may award to "equitable remedies only." Congress has demonstrated elsewhere in Title VII its ability expressly to restrict available remedies to "equitable" ones. 42 U.S.C. 2000e-5(g)(1) (authorizing district courts in Title VII cases against employers other than the federal government to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * , or any other equitable relief as the court deems appropriate").

Nor should such a restriction be inferred, as respondent suggests (Br. 9-10), from the participial phrase "including reinstatement or hiring of employees with or without back pay" in Section 2000e-16(b). That phrase

merely provides an example of the "appropriate remedies" that the EEOC may award in the administrative process. As this Court has recognized, "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); see *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941) (concluding that a similar provision of the National Labor Relations Act was "an illustrative application" and not a limitation of the available remedies); 2A N.J. Singer, *Sutherland Statutory Construction* § 47.07, at 152 (5th ed. 1992) ("the word 'includes' is usually a term of enlargement, and not of limitation").

Respondent also argues (Br. 10) that Section 2000e-16(b) should be read to permit the EEOC to award only equitable relief, because "[t]he authority delegated by Congress to [the EEOC] was commensurate with and explicitly tied to 'the policies of this section,' which were to eradicate discrimination and 'make whole' victims." Contrary to respondent's suggestion, however, those policies are advanced by allowing victims of employment discrimination to recover compensatory damages. Indeed, in 1991, Congress added compensatory damages to the array of remedies available against all employers, including the federal government, precisely in order to deter intentional employment discrimination and to make its victims whole. See H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 64-65 (1991) (explaining that compensatory damages "are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity" and to "provid[e] employers with additional incentives to *prevent* intentional discrimination in the workplace

before it happens"); *id.* Pt. 2, at 25 ("The limitation of relief under Title VII to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination."). This Court has recognized that the compensatory damages provision of the 1991 Act was designed "to further Title VII's 'central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" *Landgraf* v. *USI Film Products*, 511 U.S. 244, 254 (1994) (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975)).

2. Respondent next argues (Br. 12) that Section 1981a(a)(1) does not authorize awards of compensatory damages in administrative proceedings. He relies principally on Section 1981a(a)(1)'s statement that compensatory damages are to be available in an "action" under, *inter alia*, Section 2000e-16. As we explained in our opening brief (at 27-28), however, the EEOC's authority to award compensatory damages is not dependent on whether an administrative proceeding is an "action" within the meaning of Section 1981a(a)(1). Congress, by making compensatory damages available against the government in judicial proceedings under Section 1981a(a)(1), gave the EEOC the authority to award compensatory damages as an "appropriate remed[y]" in administrative proceedings under Section 2000e-16(b).[2]

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[2] Respondent implies (Br. 23) that the EEOC itself has not relied on Section 2000e-16(b) in concluding that it has the authority to award compensatory damages. Although the EEOC did not expressly rely on Section 2000e-16(b) in *Jackson* v. *United States Postal Service*, EEOC Appeal No. 01923399 (Nov. 12, 1992), its first decision on the issue, the EEOC has done so in subsequent decisions reaffirming its authority to award compensatory dam-

In any event, the term "action" in Section 1981a(a)(1) can reasonably be construed as encompassing both administrative and judicial proceedings in a Title VII case against an agency of the federal government. Cf. *Webster's Third New International Dictionary* 21 (1986) (defining "action" as "a deliberative or authorized proceeding"). Because a federal employee must exhaust administrative remedies before filing suit in district court, see 42 U.S.C. 2000e-16(c), an administrative proceeding against the employing agency is a necessary prerequisite to a judicial proceeding. The two proceedings thus may appropriately be viewed as consecutive phases of a single case or "action." If Congress had intended to allow compensatory damages against the federal government only in judicial proceedings, and not in administrative proceedings, Congress presumably would have defined the term "action" in Section 1981a so as to clarify that intent. It did not.[3]

3. As we explained in our opening brief (at 16-21), Section 2000e-16(c), which requires that a federal employee exhaust administrative remedies on any complaint under Title VII, informs the construction of Sections 2000e-16(b) and 1981a(a)(1).[4] Respondent's con-

ages. See, *e.g.*, *Turner* v. *Babbitt*, EEOC Appeal No. 1956390, 1998 WL 223578, at *5 (Apr. 27, 1998).

[3] Respondent also purports (Br. 14) to find significance in the statement in Section 1981a(a)(1) that a compensatory damages award is to be "in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964," 42 U.S.C. 2000e-5(g). But Congress was simply drawing a distinction between types of relief, *i.e.*, compensatory damages, on the one hand, and equitable relief, including back pay, on the other. It was not purporting to restrict the types of proceedings in which certain relief could be obtained.

[4] Under Section 2000e-16(c), a federal employee must present his Title VII complaint initially to his employing agency and, if

struction of those provisions cannot easily be reconciled with Section 2000e-16(c). Respondent does not dispute that Section 2000e-16(c) requires *all* federal employees with Title VII complaints—including those whose claims for relief include compensatory damages—to exhaust administrative remedies with respect to liability and equitable relief. An employee whose Title VII complaint included a compensatory damages claim thus would, in respondent's view, have to proceed first through the administrative process; then, even if the EEOC awarded all relief within its power to grant, the employee still would have to proceed through the judicial process in order to obtain full relief. Congress could not have intended to create such a convoluted enforcement scheme, which would be unduly costly, cumbersome, and time-consuming for employees and the government alike. Congress surely intended that federal employees, after the Civil Rights Act of 1991 as before, could obtain all of the same relief in the administrative process that they could obtain in district court. See S. Rep. No. 415, 92d Cong., 1st Sess. 16 (1971) (expressing congressional intent that Section 2000e-16(b) and (c) "will enable the Commission to grant full relief to aggrieved employees").

4. Respondent attempts to frame the question here as whether Congress, in Sections 2000e-16 and 1981a, has authorized the EEOC to award compensatory damages in the administrative process with the clarity required by this Court's sovereign immunity cases. But Congress has indisputably waived the government's sovereign immunity with respect to compensatory

dissatisfied with the agency's action on the complaint, may either appeal to the EEOC or file suit in district court. He may also file suit after an adverse decision by the EEOC on appeal.

damages awards in judicial proceedings. Such a waiver necessarily encompasses adjudicatory proceedings before the government's own administrative agency—at least where, as here, Congress has given that agency expansive authority to award "appropriate remedies" for the sorts of violations at issue. None of the cases relied on by respondent in this regard (see Br. 7-8) involves analogous circumstances. Those cases consequently are not controlling here. In any event, Sections 2000e-16(b) and 1981a(a)(1), read together, provide a sufficiently clear expression of Congress's intent to waive the government's immunity from compensatory damages awards in EEOC administrative proceedings, for the reasons stated above.

Invoking the principle that "limitations and conditions upon which the Government consents to be sued must be strictly observed," *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981), respondent seeks to characterize the jury-trial provision of Section 1981a(c)(1) as such a limitation or condition on the government's waiver of sovereign immunity with respect to compensatory damages awards under Title VII. But such a characterization finds scant support in the text or legislative history of Section 1981a(c)(1), in Congress's traditional aversion to jury trials on monetary claims against the government, or in common sense.[5]

[5] Respondent mistakenly suggests (Br. 29) that we seek to find a waiver of sovereign immunity in mere "policy considerations." To the contrary, the waiver of sovereign immunity is expressly found in the statute: in Section 1981a, the federal government has consented to liability for compensatory damages to victims of employment discrimination. The policy and purpose of Section 2000e-16(c) are relevant not to establish the waiver, but to show why the Court should reject respondent's strained effort to limit that waiver to judicial, and not administrative, proceedings.

First, Section 1981a(c)(1) states simply that "[i]f a complaining party seeks compensatory or punitive damages under this section * * * any party may demand a trial by jury."[6] Nothing in that general statutory language indicates that Section 1981a(c)(1) was adopted with the federal government in mind. Nor does the legislative history of the Civil Rights Act of 1991 contain any suggestion that Section 1981a(c)(1) was designed for the benefit of the government specifically or employers generally. As we noted in our opening brief (at 29-31 & n.20), to the extent that Congress and the President addressed the jury trial provision at all, they described the provision as a benefit to employees, not employers.

Second, this Court has recognized that "[w]hen Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial." *Lehman*, 453 U.S. at 161; see, *e.g.*, 28 U.S.C. 2402 (Supp. III 1997) (tort claims against the United States). The Court noted that "[i]t is not difficult to appreciate Congress' reluctance to provide for jury trials against the United States," given the risk that "juries 'might tend to be overly generous because of the virtually unlimited ability of the Government to pay the verdict.'" *Lehman*, 453 U.S. at 161 n.8 (quoting H.R. Rep. No. 659, 83d Cong., 1st Sess. 3 (1953)). Congress thus has generally perceived that, from the perspective of the United States as defendant, the costs of jury

[6] Respondent's assertion (Br. 16) that "Congress committed the assessment of compensatory damages to the jury system" is thus inaccurate even with respect to judicial proceedings alone. Congress did not require, but merely permitted, jury trials in Title VII cases involving compensatory damages claims.

trials outweigh any benefits. That perception undermines respondent's suggestion that the jury trial right provided in Section 1981a(c)(1) was intended as a condition on the government's waiver of sovereign immunity. In view of Congress's historical antipathy to jury trials on monetary claims against the government, Section 1981a(c)(1) is most sensibly read to permit either party to obtain a jury trial if a federal employee's claim for compensatory damages reaches district court, not to prevent such a claim from being resolved earlier by the EEOC or by a federal agency under rules promulgated by the EEOC.

Third, there is no cogent reason why Congress would have determined that the government's right to a jury trial in Title VII cases involving compensatory damages is so important as to outweigh the efficiencies to the government of having many such cases resolved by, or at the direction of, the EEOC without resort to the courts. Nor has any such reason been suggested by respondent. See Resp. Br. 23 (declaring that "the less said about this argument, the better"). Congress has made no similar determination in any other context, including the closely analogous context of Title VII claims by its own employees. As noted in our opening brief (at 29), Congress has not afforded itself the opportunity for a jury trial in every Title VII case involving a claim for compensatory damages; to the contrary, Congress provided in the Congressional Accountability Act of 1995 that such cases may be fully resolved in an administrative process (although, if the employee elects to pursue the case in district court, either party may demand a jury trial). See 2 U.S.C. 1405(g) (Supp. III 1997) (authorizing the Office of Compliance to "order such remedies as are appropriate pursuant to subchapter II of this chapter"); 2 U.S.C.

1311(b)(1)(B) (Supp. III 1997) (including compensatory damages among available remedies).[7] Respondent is thus left in the curious position of urging a construction of the relevant statutory provisions, ostensibly "in favor of the sovereign," *Ruckelshaus*, 463 U.S. at 685 (quoting *McMahon* v. *United States*, 342 U.S. 25, 27 (1951)), that is, in fact, contrary to the sovereign's interests in the efficient resolution of Title VII complaints by its employees.

Finally, respondent's position requires the Court to ignore what plainly *is* a limitation or condition that Congress imposed on the government's waiver of sovereign immunity under Title VII: the requirement in Section 2000e-16(c) that an employee exhaust administrative remedies before proceeding to district court on a Title VII complaint. Nothing in the comprehensive language of Section 2000e-16(c) suggests that compensatory damages claims are exempt from that requirement.

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[7] Respondent asserts (Br. 25) that the Congressional Accountability Act demonstrates that, when Congress intends to make compensatory damages available in the administrative process, Congress does so more clearly than it did in Sections 2000e-16(b) and 1981a(a)(1). As we explained in our opening brief (at 24 n.18), however, there is another, more logical explanation for any differences in the provisions authorizing compensatory damages for executive branch employees and congressional employees. Congress engrafted the compensatory damages remedy for executive branch employees onto an existing statutory scheme, which already authorized the EEOC to award "appropriate remedies" in the administrative process, a grant of authority expansive enough to encompass compensatory damages awards. In contrast, Congress included the compensatory damages remedy for congressional employees in an entirely new statute, which for the first time provided a comprehensive administrative and judicial enforcement scheme for their employment discrimination claims.

5. Respondent further contends (Br. 17) that "[a]dministrative proceedings on compensatory damages" would "delay[] federal employees from the exercise of their right to a trial by jury." It is respondent's construction of the relevant statutory provisions, however, that would delay the enforcement of federal employees' rights. According to respondent's position, instead of pursuing a claim for compensatory damages together with a claim for equitable relief in the administrative process,[8] an employee would have to await the completion of the administrative process and only then pursue the claim for compensatory damages in district court. As the briefs amicus curiae of the American Federation of Government Employees and the National Employment Lawyers Association confirm, federal employees, as well as federal agencies, benefit from the EEOC's ability to award compensatory damages as an "appropriate remed[y]" in the administrative process.[9]

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[8] Of course, if the employee was dissatisfied with the compensatory damages awarded at the administrative level, he still could litigate the issue de novo in district court, where he (and the government) would have a right to a jury trial.

[9] Respondent contends (Br. 27) that the adverse impact of his position on federal agencies, federal employees, and the federal courts is trivial, because, "[i]f an agency anticipates liability for compensatory damages, it may correct its error by offering a settlement." But he does not explain how an agency is to anticipate such liability if an employee is under no obligation to inform the agency that he has sustained compensatory damages. He then speculates (Br. 29) that "the pool of potential litigants"—*i.e.*, employees who must go to court to obtain compensatory damages—consequently "does not seem too large." It is impossible to estimate with any precision the number of additional cases that would reach the courts if respondent's position were adopted. But the number could well be substantial. Since 1992, notwithstanding federal agencies' ability to settle

B. The alternative grounds proffered by respondent do not warrant the Court's review on the merits

Respondent urges (Br. 30-39) that the decision below be affirmed on either of two alternative grounds that are not encompassed within the question on which certiorari was granted: first, that he did, in fact, adequately exhaust administrative remedies and, second, that the government should be estopped from asserting his failure to do so, because the government did not advise him of his right to seek compensatory damages in the administrative process. Neither ground warrants the Court's consideration on the merits.

1. Respondent asserts (Br. 30, 33) that "the record affirmatively reveals that [he] exhausted his administrative remedies," because "during the investigation of his case, [he] requested a 'monetary cash award.'" But the court of appeals held that respondent's request for a "monetary cash award" was insufficient to "put the EEOC on notice that he was seeking compensatory damages." Pet. App. 5a; see also *id.* at 23a n.2 (district court concludes that respondent "never asserted facts which would reasonably lead to compensatory damages during the administrative processing of his complaint"). The fact-specific question whether respondent provided the Department of Veterans Affairs or the EEOC with

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employees' claims for compensatory damages voluntarily, the EEOC has issued hundreds of decisions involving compensatory damages claims. In addition, the Eleventh Circuit, adopting the Seventh Circuit's rationale in this case, has held that, while agencies may voluntarily settle an employee's Title VII cases involving compensatory damages, agencies cannot be required by the EEOC to include compensatory damages in any offer of full relief to an employee pursuant to 29 C.F.R. 1614.107(h). See *Crawford* v. *Babbitt*, 148 F.3d 1318 (1998), petition for cert. pending, No. 98-1332.

adequate notice of his claim for compensatory damages is not of "sufficient general importance" to merit the Court's attention. *United States* v. *Nobles*, 422 U.S. 225, 241-242 n.16 (1975).[10]

Respondent also raises (Br. 35) the broader argument that a federal employee adequately exhausts administrative remedies merely by making "factual allegations of unlawful discrimination," without identifying the nature of the remedy that he is seeking for such discrimination.[11] Neither the court of appeals nor the district court addressed that argument. This Court should not do so either. See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996) (declining to address an issue both because it was "outside the scope of the question presented in this

[10] Respondent claims (Br. 33-35) that the EEOC concluded in *Price* v. *United States Postal Service*, EEOC Appeal No. 01945860, 1996 WL 600763 (Oct. 11, 1996), that similar language was sufficient to state a claim for compensatory damages. But *Price* is distinguishable on its facts. The complainant in *Price* stated in her written request for counseling that she was seeking an "appropriate monetary reward" because her supervisor had allegedly "grabbed her by the arm, and pushed her." *Id.* at *1. She did not claim to have been denied a position or a promotion, and thus would not have been eligible for back pay. In such circumstances, the only "monetary reward" that she could have been seeking was compensatory damages. In contrast, since respondent had complained about the denial of a promotion and had specifically requested "GS-11 backpay" in his EEO complaint (J.A. 23), respondent's oral statement to an EEO investigator that he would accept a "monetary cash award" (Resp. Br. 33) in order to settle the case could appropriately be construed as referring to back pay alone.

[11] Similar arguments are raised by amici American Federation of Government Employees and National Employment Lawyers Association.

Court" and because "we generally do not address arguments that were not the basis for the decision below").

Respondent's position is inconsistent, moreover, with the text and purposes of the exhaustion requirement of Section 2000e-16(c) and with Congress's treatment of exhaustion in other contexts. Section 2000e-16(c) authorizes a federal employee to file suit in district court only "if aggrieved by the final disposition of his *complaint*, or by the failure to take final action on his *complaint*" by his employing agency or by the EEOC (emphasis added). The term "complaint" is ordinarily understood to include a demand "for the relief the pleader seeks." Fed. R. Civ. P. 8(a); *Black's Law Dictionary* 285 (6th ed. 1990). Nor would the purposes of administrative exhaustion be served if the agency, in the first instance, and the EEOC, on appeal, had to guess at what relief would satisfy an aggrieved employee. The EEOC and the Department of Veterans Affairs cannot be expected to have known, for example, that respondent was suffering "mental anguish and emotional distress" (Resp. Br. 3) unless respondent told them. Congress's understanding that exhaustion requires a claimant to put the agency on notice not only of the basis for liability, but also of the relief sought, is reflected in the Federal Tort Claims Act, which bars a claimant from instituting a civil action "for any sum in excess of the amount of the claim presented to the federal agency" except in certain specified circumstances. 28 U.S.C. 2675(b).[12]

[12] The exceptions are "where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time o[f] presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." 28 U.S.C. 2675(b). We do not contend that a federal employee would be precluded by the exhaustion requirement of

We do not disagree with respondent's contention (Br. 31) that "specific factual pleading of a particular category of damages is not required for exhaustion." The EEOC has not applied the exhaustion requirement in such a rigid manner. As respondent acknowledges (Br. 33-34 n.8), "[t]he Commission has held that a complainant need not use legal terms of art such as 'compensatory damages,' but may merely use words or phrases to put the agency on notice that the relevant pecuniary or non-pecuniary loss has been incurred" (quoting *Price* v. *United States Postal Serv.*, EEOC Appeal No. 01945860, 1996 WL 600763, at *3 (Oct. 11, 1996)). He also acknowledges (Br. 31) that the EEOC has held that "a request for relief may be amended at any time during the administrative process without restriction." But a complainant must do more to put the agency and the EEOC on notice of his claim for compensatory damages than respondent did in this case. As the Fifth Circuit has explained:

> [T]he employee need not present his claim for compensatory damages in a legal or technical manner. He must, however, inform the employing agency or the EEOC of the *particular facts of the case* that demonstrate that he has suffered an emotional and/or mental injury that requires the payment of compensatory damages to make him whole. Such facts obviously must demonstrate more than the mere fact of forbidden discrimination or harassment.

Fitzgerald v. *Secretary, United States Dep't of Veterans Affairs*, 121 F.3d 203, 208 (1997)

2. Respondent finally contends (Br. 37) that the government "should be estopped from asserting exhaustion by its failure to advise [him] of his right to request compensatory damages." That claim is unsuitable for resolution by the Court. Respondent's estoppel claim was not addressed by the court of appeals or, except in a single sentence (Pet. App. 23a n.2), by the district court. And the factual premise of the claim has not been established. Respondent, in an affidavit submitted to the district court, asserted that "[t]he EEO counselor, Mr. Mitchell, did not explain to me that I could receive damages for mental or emotional distress." Aff. ¶ 9, Exh. A to Pl.'s Resp. to Def.'s Rule 12(m) Statement. But the government subsequently "dispute[d] and denie[d]" that assertion. Def.'s Reply to Pl. Michael Gibson's Rule 12(n) Statement ¶ 23, at 4. The district court made no findings of fact on the issue.

In any event, this Court, while consistently rejecting claims of equitable estoppel against the federal government, has stated that only "affirmative misconduct" might give rise to such a claim. *OPM* v. *Richmond*, 496 U.S. 414, 421-422 (1990). A mere failure to provide information, especially when that information is publicly available, does not constitute "affirmative misconduct." See *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam) (government's failure to advise alien who served in U.S. armed forces of naturalization rights did not give rise to equitable estoppel); cf. *Schweiker* v. *Hansen*, 450 U.S. 785, 788-790 (1981) (per curiam) (government employee's erroneous statements that

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Section 2000e-16(c) from raising a compensatory damages claim that was based on evidence that was discovered or facts that arose after the conclusion of administrative proceedings. A district court would seem to have the authority in such circumstances either to remand the matter to the agency or the EEOC for consideration of the claim or to deem the exhaustion requirement to be satisfied.

applicant was ineligible for Social Security benefits did not constitute "affirmative misconduct" that could estop government from denying retroactive benefits).

* * * * *

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

APRIL 1999

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Supreme Court of the United States
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TOGO D. WEST, JR.,
SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,
Petitioner,
v.
MICHAEL GIBSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AS AMICUS CURIAE IN SUPPPORT OF PETITIONER

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. 98-238

TOGO D. WEST, JR.,
SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,
Petitioner,
v.
MICHAEL GIBSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AS AMICUS CURIAE IN SUPPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE [1]

Amicus Curiae, The American Federation of Government Employees (AFGE) is a labor organization affiliated with the AFL-CIO which represents approximately 600,000 employees of the United States federal government and the government of the District of Columbia.

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, contributed monetarily to the preparation or submission of this brief. Pursuant to Rule 37(3)(a), written consent of the parties permitting the filing of this brief as *amicus curiae* have been obtained and are filed along with this brief.

On behalf of its members, AFGE presents grievances and complaints, including administrative and judicial Equal Employment Opportunity (EEO) complaints, and carries on legislative activity to improve the welfare of the employees it represents. As part of its legislative activity, AFGE was influential in the drafting of the language of the Civil Rights Act of 1991 that is being questioned in this case. Therefore, AFGE files this brief in support of the interpretation that the Equal Employment Opportunity Commission (EEOC) may award compensatory damages and that failure by an employee at the administrative level to request compensatory damages does not bar an award of compensatory damages. As such AFGE joins the Petitioner's contention that the holding below that the EEOC lacks the authority to award compensatory damages should be reversed, and AFGE joins the Respondent's contention that the case should be reversed, and AFGE joins the Respondent's contention that the case should be remanded to the trial level to adjudicate Respondent's claim of compensatory damages.

SUMMARY OF ARGUMENT

1. The EEOC has the authority to order federal agencies to award federal employees compensatory damages for violations of Title VII of the 1964 Civil Rights Act. This authority derives from the Civil Rights Act of 1991, where Congress provided entitlement to compensatory damages for governmental employees, and punitive damages for non-governmental victims of discrimination. Thereafter, and prior to enactment, Congress amended the legislation by adding two words at the request of AFGE. These two words incorporate into the damages section of the new legislation specific reference to the statutory source of the federal employee complaint processing system administered by the EEOC. This exclusive administrative forum for federal sector EEO complaints is governed by the regulations promulgated by the EEOC, which has the statutory authority to provide "appropriate

remedies." The Court of Appeals erroneously ignored the express Congressional amendment, rendering instead the additional terms superfluous.

2. A federal employee is not barred from collecting compensatory damages for failure to explicitly request compensatory damages at the administrative phase since exhaustion of administrative remedies does not include notice of specific, requested relief. Rather, exhaustion of administrative remedies in the federal sector EEO process controlled by the employer/agency merely requires timely notice of the charge and subsequent cooperation and participation, as defined by regulation, in the agency processing of the complaint.

ARGUMENT

I. THE EEOC HAS THE AUTHORITY TO ORDER FEDERAL AGENCIES TO AWARD FEDERAL EMPLOYEES COMPENSATORY DAMAGES FOR VIOLATIONS OF TITLE VII OF THE 1964 CIVIL RIGHTS ACT.

A. The Plain Meaning of the Civil Rights Act of 1991 Authorizes the EEOC To Order Federal Agencies To Award Federal Employees Compensatory Damages in Cases of Unlawful Employment Discrimination as a Result of the "AFGE Fix" Which Caused the Inclusion of Language Into the Text of the Statute Referencing Section 717 of the Civil Rights Act of 1964.

The original draft of the Civil Rights Act of 1991 (CRA 1991) did not contain any reference to Section 717. However, the CRA 1991 as passed into law states in part that

> [i]n an action brought by a complaining party under section 706 *or 717* of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and

punitive damages as allowed in subsection (b) . . . (emphasis added)[2]

The "or 717" phrase is a direct reference to the unique federal employee administrative scheme.[3] This phrase was added at the request of AFGE and is therefore referred to herein as the "AFGE fix." As discussed in detail below, the AFGE sponsored language was intended to amend legislation, which already provided compensatory damages for federal employees, to include direct reference to the EEOC administered complaint processing scheme, thus removing any doubt that EEOC has the power, indeed the responsibility, to award compensatory damages.

On its face, the statutory language neither references judicial nor administrative proceedings. Whether the administrative process is included under the CRA 1991 is established by the plain meaning of the words "action brought . . . under section . . . 717." Two traditional canons of statutory construction aid in this plain meaning analysis. First, when a word has more than one ordinary meaning (such as the word "action"), which ordinary meaning is meant by the statute may be deduced by determining how the same word is used in related or referenced sections and/or statutes. Second, each word and/or section in a statute should be given effect. In other words, the entire "section 717" should be given

[2] Civil Rights Act of 1991, Pub. L. No. 102-166, codified at 42 U.S.C. 1981a(a)(1). Subsection (b) of the CRA 1991 provides that if the respondent is a government, government agency or political subdivision then punitive damages are not recoverable However, there is no such exclusion regarding compensatory damages.

[3] Section 717 of the Civil Rights Act of 1964 is codified at 42 U.S.C. 2000e-16 (1994 and Supp. II 1996) [hereinafter Section 717]. Similarly, Section 706 of the Civil Rights Act of 1964 is codified at 42 U.S.C. 2000e-5 (1994 and Supp. II 1996) [hereinafter Section 706].

effect since the section in its entirety was referenced.[4] "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey v. U.S.*, 516 U.S. 137, 145 (1995).

Section 717, to which the CRA 1991 now refers, is the section that empowers the EEOC to prevent unlawful employment discrimination. Section 717 tracks the process through which a discrimination charge is brought by a federal employee and considered in the administrative level, and may eventually reach the court system. Throughout Section 717, the word "action" is used in various contexts.[5] In subsection (a), it states that "all personnel

[4] As part of the determination of whether the EEOC has the authority to require federal agencies to award compensatory damages after an EEOC finding of unlawful employment discrimination, the court below "notes" that some of the language contained in the CRA 1991 is ambiguous. *Gibson v. Brown*, 137 F.3d 992, 997 (7th Cir. 1998). The court below questions whether the words "action" is a "federal suit in district court, an EEOC proceeding, or both." *Id.*

When statutory language is ambiguous, courts have turned to the legislative history for guidance. The court below concludes that Congress intended an action brought under Section 717 to be a civil action in district court. The court below errs in its analysis. In support of its holding, the court below cites to various parts of the Civil Rights Act of 1964 which discuss court proceedings. There are three flaws in the court's argument. First, the Congress that passed the original language of Section 717 is not the same Congress that drafted and passed the CRA 1991. Therefore, reviewing the language of Section 717 describes the Congressional intent of an earlier Congress. Second, and more significantly, the court neglects to cite to parts of Section 706 and 717 in which Congress included the administrative process when using the word "action." Lastly, by focusing on the part of Section 717 that refers to judicial proceedings, the court fails to give effect to the entire section. After all, the CRA 1991 does not specify "717 as it relates to civil actions." Rather, it simply states "or 717" which encompasses the administrative process and which itself repeatedly refers to actions in the administrative context.

[5] Section 706 also uses the word "action" to refer to the administrative and judicial process. In subsection (b), it states that the "Commission is authorized to take action with respect to the

actions" by agencies shall be non-discriminatory. In subsection (c), it states that

> within 90 days of receipt of notice of final *action* taken by . . . the Equal Employment Opportunity Commission upon an appeal . . . or after one hundred and eighty days from the filing of the initial charge with . . . the Equal Employment Opportunity Commission . . . an employee or applicant for employment, if aggrieved . . . by the [EEOC's] failure to take final *action* on his complaint may file a civil action as provided in section 2000e-5 of this title. . . (emphasis added)[6]

Thereinafter, the statute refers to judicial proceedings as "civil actions." Thus, the plain meaning of the word "action" in Section 717 includes the administrative process.

Further support for this ordinary interpretation of the words "action brought . . . under . . . 717" can be gleaned from the legislative history. During floor debate, the Danforth/Kennedy Amendment No. 1274 was introduced in the nature of a substitute and eventually passed into law with amendment as the CRA 1991.[7] The Dan-

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charge." In subsection (d) it states that the "Commission shall, before taking any action with respect to such charge . . ." It is only at subsection (f) that the word "action" is used in conjunction with a judicial, non-EEOC proceeding. Specifically, subsection (f) states that in a case against the government, governmental agency or political subdivision, "the Commission shall take no further action and shall refer the case to the Attorney General who may bring civil action . . ." Therinafter, court proceedings are referred to as "actions," "civil actions," and/or "judicial actions." If the Congress that passed the original Section 706 intended the word "action" to refer to court proceedings only, then including the words "civil" or "judicial" actions would be redundant.

[6] *See also supra*, fn 5 (discussion of use of word "action" in Section 706 which is cross referenced in Section 717. Section 706 also uses term "action" in reference to EEOC proceedings).

[7] 137 Cong. Rec. S28846 (daily ed. Oct. 29, 1991).

forth/Kennedy Amendment provided compensatory damages in cases of intentional discriminaton. The availability of compensatory damages was limited only by the size of the employer and capped at $300,000. There is no prohibition of the recovery of compensatory damages from the government. The Danforth/Kennedy Amendment also provided for punitive damages, stating "a complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision)." Thus, it is clear that the original bill provided compensatory and punitive damages in cases of intentional discrimination with the exception that punitives were not to be available against the government. Stated positively then, the bill already provided compensatory damages against the "government, government agency, or political subdivision" even prior to the subsequent "AFGE fix."

During the discussion regarding the Danforth/Kennedy Amendment, Senator Warner suggested that he wanted an amendment that would include federal employees in the damages section.[8] In response, Senator Kennedy announced that it was his understanding, as well as Senator Danforth's understanding, that federal employees were included in the damages provisions in the Danforth/Kennedy Amendment.[9] The language of the Danforth/Kennedy Amendment was broad enough to include not only private employees, but also government employees. To wit, the language stated that a "complaining party" could bring action for compensatory damages and that if a "complaining party" seeks such damages then "any party" may request a trial by jury. "Complaining party" and "any party" includes federal employees.

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[8] 137 Cong. Rec. S28880 (daily ed. Oct. 29, 1991) (statement of Senator Warner).

[9] 137 Cong. Rec. S28880 (daily ed. Oct. 29, 1991) (statement of Senator Kennedy).

Senator Kennedy continued, stating that he believed it would help "ensure" that federal employees are covered "by adding explicit language referring to section 717 and the Rehabilitation Act." Senator Kennedy asserted that he was "hopeful we will be able to make the kind of adjustment needed to make the coverage of federal employees even clearer . . . by adding section 717 of the Civil Rights Act as well as comparable ADA provision." Later during the discussion, Mr. Warner returned to the floor to re-emphasize his belief that the Danforth/Kennedy Amendment omitted federal employees from benefitting from the damages section. Mr. Warner then explained that he sought to assure federal employees "the same protections that the underlying legislation provides for other private sector citizens in employment situations."[10] He further explained that without the amendment, approximately three million federal employees would be left without full remedies and that he wished to thank the American Federation of Government Employees for bringing attention to this matter. Thus the proposed amendment to the Danforth/Kennedy bill as initially conceived was intended to clarify and ensure that federal employees—who are required to first exhaust administrative remedies—may be awarded compensatory damages not only as designed in the Danforth/Kennedy bill but throughout the entire 717 process.[11]

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[10] 137 Cong. Rec. S28898 (daily ed. Oct. 29, 1991) (statement of Senator Warner).

[11] Senator Mikulski then spoke on behalf of the yet unwritten amendment proposed by Senator Warner and the AFGE. During her short statement, Senator Mikulski explained that the amendment will bring parity to private sector and federal employments in part because the "amendment will make it possible for a jury to award compensatory damages to Federal employees." 137 Cong. Rec. S28889 (daily ed. Oct. 29, 1991) (statement of Senator Mikulski); *see also* 137 Cong. Rec. S29022 (daily ed. Oct. 30, 1991 (statement by Ms. Mikulski). Her statement was general and limited to the notion of parity. This may explain why she was silent as to the issue of an award of compensatory damages for employees through administrative proceedings.

On October 30, 1991, Senator Warner sent Amendment 1292 to the desk for immediate consideration.[12] The purpose of Amendment 1292 was to "clarify that federal employees may recover damages for intentional employment discrimination and to allow damages for intentional discrimination under the Rehabilitation Act fo 1973."[13] Three out of the seven changes made by Amendment 1292 added the words "or 717" to the text of the Danforth/Kennedy Amendment. Senator Warner began his explanation of what the amendment was designed to accomplish with a brief description of the federal discrimination complaint process. During this description Senator Warner reminded the Senate that federal employees were required to first submit their action for EEOC examination.[14] Senator Warner then jumped into the "heart of the matter" which

> is the manner in which the [federal] employees are compensated in cases of intentional discrimination. Remedies available under present law include:
>
> One, reinstatement; two, back pay; three, restoration of benefits; and four, public notice.
>
> My amendment would add to the list of remedies compensatory damages including those covering pain and suffering, and that is a very important subject.[15]

At no point in Senator Warner's explanation of the amendment did he exclude compensatory damages from being awarded at the administrative level. Quite the contrary, Senator Warner stated that the compensatory damages were to be added to a list of damages that the EEOC

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[12] 137 Cong. Rec. S29020 (daily ed. Oct. 30, 1991) (statement of Senator Warner).

[13] *Id.*

[14] 137 Cong. Rec. S29021 (daily ed. Oct. 30, 1991) (statement of Senator Warner).

[15] *Id.*

is entitled to award. Furthermore, Senator Warner never referred to the specific subsections in 717 that refer only to judicial proceedings. Instead, Senator Warner focused on Section 717 as a whole, which includes EEOC proceedings and directs EEOC to enforce "through appropriate remedies." [16]

It is clear from the legislative history that the CRA 1991 as passed was intended to award federal employees the remedy of compensatory damages in judicial proceedings. It is also clear that Congress intended for the "AFGE fix" to verify that remedy at the judicial level and add that remedy to the administrative level. Four senators in total spoke directly about the amendment. All addressed the notion of parity between private employees and federal employees. At no point of the Congressional debate did any senator state that action at the EEOC level was not included in the amendment. The senators never explicitly limited their discussion regarding Section 717 to the subsections within that address only judicial proceedings. Additionally, at no point did any senator suggest that compensatory damages are not an appropriate remedy for the EEOC to grant.[17] If the senators wished to limit the EEOC's grievances, they could have amended this through the CRA 1991. Yet the plain language of the CRA 1991 does not limit the EEOC from granting "appropriation remedies" because the word "action" includes administrative action and because Congress intended compensatory damages provided for in the CRA 1991 to reach federal employees at the administrative level.

Moreover, the amendment to the CRA 1991 should not be now nullified by a reading that renders the language

[16] Section 717(b).

[17] Section 717(b) grants the EEOC the right to grant "appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section. . . ."

meaningless. Rather, any statutory interpertation should begin "with the assumption that Congress intended each of its terms to have meaning." *Bailey*, 516 U.S. at 145. Congress had already provided damages for civil rights violations of a compensatory (but not punitive) nature to federal employees. The subsequent amendment referencing the federal sector process contained in Section 717 must have done something more. "We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Id.* at 146. If federal employees are denied the right to recover compensatory damages in the comprehensive administrative process established by the EEOC under the authority of Section 717, then "the AFGE fix" would be merely superfluous statutory language.

B. The EEOC Has Permissibly Interpreted the Words "Actions Brought . . . Under Section . . . 717" To Include Actions Brought at the Administrative Level. When an Agency Interprets in a Permissible Manner Statutory Language That It Is Entrusted To Administer, the Court Shall Then Defer to the Agency's Construction.

After the passage of the CRA 1991 in late November, 1991, the EEOC first awarded compensatory damages to a federal employee in the 1992 decision of *Jackson v. Runyon, United States Postal Service.*[18]

In *Jackson,* the EEOC analyzed whether the Postal Service appropriately canceled Jackson's complaint when he rejected an offer of full relief. The EEOC defines full relief as "relief that would have been available to appellant had he prevailed on every issue in his complaint." [19] In determining full relief, the EEOC relied on the CRA

[18] *Jackson v. Runyon, United States Postal Service*, 93 FEOR 3062, EEOC Appeal No. 01923399 (Nov. 12, 1992). See also Staudmeister, Comment: *Grasping the Intangible: A Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process*, 46 Am. U.L. Rev. 189, 192-194 (1996).

[19] *Jackson, supra* note 18, at 3 (cite omitted).

1991 that "makes compensatory damages available to federal sector complainants in the administrative process."[20] The EEOC based their interpretation of the CRA 1991 "upon a thorough examination of the statute's language and policy considerations." [21] The EEOC found that the term "action" refers to both court and administrative proceedings. The EEOC noted that during a Senate debate on the CRA 1991, an amendment used the term "action" to mean administrative action.[22] The EEOC limited the awarding of compensatory damages for alleged conduct occurring after the effective date of the CRA 1991. Since the Postal Service did not address the issue of compensatory damages where the complaint showed "objective evidence that he or she has incurred compensatory damages," [23] the EEOC concluded that full relief was not really offered.

Since *Jackson*, the EEOC has repeatedly awarded compensatory damages to federal employees whose complaints of unlawful employment discrimination are found to be meritorious and caused by intentional discrimination, with injuries proven to be caused by the unlawful discrimination. As this Court instructed in *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984),[24] an agency's interpretation of a law it administers should be granted deference and upheld if the agency's interpretation is permissible. In order to determine permissibility, the court must first review the Congressional intent and if clearly articulated, the court must then effectuate Congressional intent.[25] However, when Congressional intent is ambiguous or inferential because "Congress has not directly addressed the precise question at issue," [26] then it is not for the court to "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." [27] Instead, the court next reviews whether the agency's construction is reasonable, i.e., not "arbitrary, capricious or manifestly contrary to the statute." [28]

20 *Id.*

21 *Id.*

22 *Jackson, supra* note 18, at 5 fn. 5.

23 *Id.*

24 *See also Atlantic Mutual Insurance Co. v. Commissioner of Internal Revenue,* 523 U.S. 382 (1998) (holding applies the principles of *Chevron*).

25 *Chevron, supra* at 842-843.

As discussed above,[29] Congress intended that the compensatory damages provision be applicable to federal employee actions. However, in the alternative, the court must next examine whether the EEOC's construction is reasonable. In determining reasonableness, the court need not find that the EEOC's construction is the same as the court would have held had the matter been first presented to the court.[30]

The EEOC's determination that they could require compensatory damages as part of the relief offered a federal complainant upon a finding of unlawful discrimination is

26 *Id.* at 843.

27 *Id.* (footnote omitted).

28 *Id.* (citations and footnotes omitted).

29 See *supra* pages 9-11.

30 *Chevron, supra* at 843 fn. 11. The court below complains that the award of compensatory damages at the administrative level would cause conflicts with the section that provides for a jury trial. As this Court has acknowledged, "deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'" *Id.* at 844 quoting *U.S. v. Shimer,* 357 U.S. 374, 382 (1961). If the court below is correct that the subsections are in conflict, it is the province of the EEOC, which has a fuller understanding of the nuances of the grievance scheme to square the conflicts.

neither capricious, arbitrary nor contrary to the CRA 1991. First, this construction is consistent with the ordinary meaning of the statute. The CRA 1991 extended the damages provisions in cases of employment discrimination to include compensatory damages and referenced Section 717. Second, the EEOC already had the authority under Section 717 to award any appropriate remedy not specifically prohibited within the title. Compensatory damages were not specifically prohibited in the legislative history or in the language of the CRA 1991, or by the original title. Third, the legislative history underscores the congressional intent to grant federal employees greater protection against civil rights violations. The EEOC's construction of the CRA 1991 grants greater protection to federal employees and as such is consistent with the unambiguous congressional intent and policy considerations.[31]

Fourth, the EEOC would be severely limited in enforcing anti-discrimination provisions if it were unable to fully grant all relief entitled to a complainant. It would render the EEOC in essence a lame duck agency. The EEOC as part of its functions, adjudicates as well as mediates disputes between employers and employees which may result in voluntary conciliation agreements and/or settlements between the parties.[32] The negotiation process would be hampered if all remedies are not available. Complainants would be required to exhaust the administrative remedy, but would in any event go forward to judicial proceedings for the compensatory damages.[33]

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31 *Id.* at 863 ("more importantly, the history plainly identifies the policy concerns that motivated the enactment; the plantwide definition [i.e. the administrative construction] is fully consistent with one of those concerns . . .").

32 *See* Staudmeister, *supra* note 18, at 201 (Title VII emphasized employer/employee conciliation).

33 *See id.* at 194.

Fifth, finding that compensatory damages are not available through the EEOC is counter to the policy considerations made by the drafters of CRA 1991. When discussing the motivation behind "the AFGE fix," Senator Wirth described federal employees as "second-class citizens" who have not been afforded the "same rights, not given the same redress, not given the same remedies as other individuals in this society."[34] He explained that the amendment assures federal employees that at the very least, they will be "treated equitably and treated fairly and not treated with the back of the hand or as second-class citizens" with respect to remedies. Federal employees are required to grieve through the EEOC. If the EEOC is restricted from awarding compensatory damages, then the federal employees will have to process their claims once under Part 1614 and then re-file in federal district court before they can even seek compensatory damages. In other words, their ability to even ask for full relief from unlawful discrimination will be continued until after the formal agency process with agency counseling, agency investigation, adjudication by an administrative judge from the EEOC, final agency decision, and appeal to EEOC's Office of Federal Operations. Such a protracted limbo would cause federal employees to remain the second-class citizens that the Congress warned against.

For the above mentioned reasons, the EEOC's construction allowing an award of compensatory damages by the EEOC is permissible and should be bestowed deference. The EEOC acted within its authority in 1992 when it determined that the CRA 1991 extended the damages provision to the formal federal sector administrative process.

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34 137 Cong. Rec. 29021 (daily ed. Oct. 30, 1991) (statement of Senator Wirth).

II. RESPONDENT IS NOT BARRED FROM COLLECTING COMPENSATORY DAMAGES FOR FAILURE TO EXPLICITLY REQUEST COMPENSATORY DAMAGES AT THE ADMINISTRATIVE PHASE SINCE (a) EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIRES NOTICE TO THE EMPLOYING AGENCY OF THE ALLEGED DISCRIMINATORY ACT(S) BUT NOT OF SPECIFIC RELIEF AND (b) IT IS THE EMPLOYING AGENCY THAT DIRECTS THE COMPLAINT PROCESS AND BEARS THE BURDEN OF INQUIRY INTO THE SPECIFIC RELIEF.

The federal employee administrative process is described at 29 C.F.R. Part 1614 and requires the employing agency to, *inter alia,* administer both a pre-complaint conciliation process and a post-complaint formal investigative and adjudicative process. Exhaustion includes placing an affected agency on notice of the facts surrounding the alleged discriminatory event. However, a federal employee is not required to place an agency on notice of the specific, requested relief due to the alleged wrong. Indeed, under traditional civil rights analysis, a victim of discrimination is presumptively entitled to full make-whole relief following a timely complaint proven to be true. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 422 (1975).

Federal employees are required to exhaust their administrative remedies. In *Brown v. GSA,* 425 U.S. 820 (1976), this Court held that Section 717 requires federal employees to exhaust the administrative process before filing suit in federal district court. Section 717 does not describe the degree of specificity with which the presentation of the grievance at the administrative process must be offered.[35] As a result, the question of what constitutes exhaustion of administrative relief and sufficient notice to agencies has been left open.

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[35] *President v. Vance,* 627 F.2d 353, 355 (D.C. Cir. 1980).

The courts have tended to find the exhaustion requirement satisfied when the complaint meets the time requirements, submits a complaint to the affected agency and/or EEOC, and cooperates with the affected agency during the process set forward in the regulations promulgated by the EEOC governing the EEOC complaint process for the federal sector, namely Part 1614.[36]

One purpose of exhaustion is to place the affected agency on *notice* of the factual allegations. The circuits are inconsistent as to what constitutes adequate notice. There are many points at which the complaint may place the agency on notice. The written complaint submitted to the agency is one of the mechanisms by which the complainant may place the agency on notice. The EEOC guidelines specify that the complainant (or the complainant's attorney) must submit a signed statement that identifies (1) the aggrieved individual, (2) the agency, (3) the actions or practices that are alleged to be discriminatory, and (4) contact information for the complainant or representative.[37] Often, a standard complaint is supplied or available from the agency.[38] The guidelines contained in the EEOC regulations do not require the complainant to identify any damages in the written complaint submitted to the agency.

The EEOC has recognized that requests for damages need not necessarily contain specific language.[39] Similarly,

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[36] Barbara Lindemann and Paul Grossman, *Employment Discrimination Law* (3rd ed. 1996) at 57; *see also Wade v. Secretary of the Army,* 796 F.2d 1369, 1377 (11th Cir. 1986) ("Good faith effort by the employee to cooperate with the agency . . . and to provide all relevant, available information is all that exhaustion requires.").

[37] 29 C.F.R. 1614.106(c) (1996).

[38] Lindemann and Grossman, *supra* note 36, at 29 fn. 86.

[39] Ernest C. Hadley, *A Guide to Federal Sector Equal Employment Law and Practice* (11th ed. 1998) at 1538.

courts that have reviewed whether the complaint has given the agency sufficient notice have recognized "the fact that EEO complaints are to be liberally construed."[40] In *President v. Vance*, the D.C. Circuit held that failure to plead specific remedies at the administrative phase is not necessarily failure to provide notice to the affected agency and therefore is not failure to exhaust administrative remedies.[41] In *President*, the federal employee, Mr. President,

[40] *Brown v. Marsh*, 777 F.2d 8, 15 (D.C. Cir. 1985) ("we have suggested that notice may be adequate where a claim is brought to the agency's attention . . . even if the argument or claim is not clearly set out in the complaint."); *Young v. National Center for Health Services Research*, 828 F.2d 235 (4th Cir. 1987) ("we are mindful of the traditional rule that EEO pro se complaints are to be liberally construed . . . and for this reason we do not think it fatal to her case that Dr. Young's administrative complaints did not use the precise words 'constructive discharge.'").

[41] *See also* 29 C.F.R. 1614.106 which charge both employing agency and EEOC with duty to afford victims of discrimination full relief regardless of what complainant writes in the corrective action on initial EEO complaint form.

In *Fitzgerald v. Secretary, U.S. Department of Veterans Affairs*, 121 F.3d 203 (5th Cir. 1997), the court held that allowing the employee to raise a claim for compensatory damages for the first time in U.S. district court would thwart the purpose of requiring administrative exhaustion of claims. However the court then narrowed this requirement when it stated that an agency must be "put on notice of fears that may justify an award of compensatory damages" and then "the burden shifts to the employing agency to investigate the claim for compensatory damages." The court comments begs the question of whether notice of the facts surrounding the existence of a discriminatory act may be enough to satisfy notice of facts that may justify an award of compensatory damages. The court reiterated the principle that the language used by the complainant need not be technical or legal.

Additionally, the facts in *Fitzgerald* are distinguishable from *President* which may have led to the different conclusions. In *Fitzgerald*, the employee failed to act with due diligence and cooperation with the agency. When the agency offered full relief, Fitzgerald did not respond in a timely manner. Such action, in and of itself, is equal to failure to exhaust administrative remedies. Hadley, *supra* note 39, at pg. 1539.

alleged that he was given a poor performance evaluation due to racial discrimination.[42] Mr. President met with the agency's equal employment counselor and then filed a formal administrative complaint.[43] In the complaint Mr. President requested three remedies which included the elimination of "the present unwritten policy in CU to eliminate, downgrade or prevent the promotion of Minority Officers. . . ."[44] Mr. President did not specifically request in the complaint promotion nor backpay. The agency investigator found support for Mr. President's allegations of discrimination and the agency forwarded proposed remedies.[45] Mr. President accepted the finding of discrimination but rejected the agency's proposed relief. Instead he requested, in addition to the original requests in his complaint, promotion and backpay. Mr. President asked the agency for a final decision. Mr. President also instituted suit in the District Court and pled for, among other things, promotion and backpay.

The D.C. Circuit in its review of President's case, found that the complaint's mention of the unwritten policy to prevent promotion to minorities was adequate notice to the employing agency. Additionally, the court pointed out that the employing agency had been told before the issuance of its final decision and that too was sufficient notice. *President* thus holds that notice of requested damages does not have to be given with specificity nor at any particular time before the agency's final decision. The D.C. Circuit also reviewed pertinent legislative history and case law regarding the application of Title VII to the private sector. This review seems particularly pertinent now after the passage of CRA 1991, wherein Congress

[42] *President*, *supra* note 35, at 356-359.

[43] *Id.* at 357-358.

[44] *Id.* at 358.

[45] *Id.*

attempted to equalize the private sector and federal sector. The court noted that

> [b]y insisting in Section 717(c) that a complaining employee seek relief within his agency in the first instance, Congress made certain that the agency would have the opportunity as well as the responsibility to right any wrong that it might have done. Congress did not, however, intend to erect a massive procedural roadblock to access to the courts.[46]

The D.C. Circuit also cited to this Court's ruling in *Love v. Pullman Co.* in which was stated that the exhaustion requirement should not be understood to create technicalities that "are particularly inapproriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."[47] Based on this assertion in *Love* and the Congressional intent behind Section 717, the D.C. Circuit reasoned that

> [i]t cannot reasonably be expected that a lay complainant will always phrase his prayer for relief so narrowly as to leave no question about what he seeks . . . . Once discrimination has been demonstrated, a respectable part of the burden of fashioning suitable relief must shift to the discriminating agency lest the ultimate goal of Title VII be frustrated.[48]

Thus, exhaustion by the employee relates to notice of the discrimination, not the remedies. After all, all issues of damages stemming from discrimination are reasonably related to that discrimination.[49] Therefore, once put on

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[46] *Id.* at 362.

[47] *Id.* quoting *Love v. Pullman Co.*, 404 U.S. 522 (1972).

[48] *Id.* at 362-363.

[49] *See* Lindemann and Grossman, *supra* note 36, at 1567 ("courts have . . . limited the scope of a judicial complaint to those issues that could have reasonably been expected to grow out of the administrative complaint.").

notice of an alleged discriminatory act, it is the agency that has the burden of inquiring after the specific relief. In this way, the employee who has been discriminated against may be made whole.

There are multiple references in Part 1614 to the responsibilities of the affected agency in the grievance process. Part 1614 creates a progressive complaint system that requires the affected agency to lead, direct and control much of the complaint process. For example, the regulations require that each federal agency designate equal employment opportunity personnel who shall make written materials regarding administrative and judicial remedial procedures available to employees who allege employment discrimination.[50] Additionally, the regulations require the employee to first approach the agency in a "pre-complaint" stage that involves informal resolution.[51] During this stage, the complainant meets with a counselor who "must advise individuals in writing of their rights and responsibilities, including . . . . the duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in pre-complaint counseling for issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency."[52] These are just two examples of the burdens which EEOC regulations place on the employing agency to advise the employee. If the complainant does not know to specify his or her required relief, it is the agency's duty to inform. Further, the agency is required to advise the complainant from the initial stages that any issues which are related to the alleged discriminatory act will be considered in future proceedings. Damages, even unspecified, are issues related to the alleged discriminatory act. Therefore, unspecified damages should not be barred in a subsequent complaint filed with the agency.

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[50] 29 C.F.R. 1614.102(b)(3-4) (1996).

[51] 29 C.F.R. 1614.105 (1996).

The second stage of the complaint process is the submission of a formal complaint to the agency.[53] Once accepted, an agency investigator investigates the complaint. The permitted scope of the investigation is broad. The investigator is not required to limit the investigation to the specific allegations made by the complainant.[54] Common sense dictates that if the investigator has the authority to inquire beyond the specific allegations of discrimination, he or she also has the authority to investigate into the details of alleged discrimination including any possible damages that may have resulted from the alleged wrong.

At the conclusion of the agency investigation, the employee has the right to either request a final decision from the agency or a hearing before an administrative judge at the EEOC. At any time during this process, the employing agency may fully resolve the complaint by offering relief. Recently, through rulemaking, EEOC has proposed to reform Part 1614 to add a Rule 68-like "offer of resolution" that would protect an agency from further fee liability in the event a proper offer of judgement and relief is rejected by the complainant.[55]

The EEOC has held that an employee may place an agency on notice for his or her request for (compensatory) damages at almost any stage of the administrative process.[56] This flexible and non-rigid holding is consistent

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[52] 29 C.F.R. 1614.105(b) (1996).

[53] 29 C.F.R. 1614.106 (1996).

[54] Lindemann and Grossman, *supra* note 36, at 1551; *see also* 29 C.F.R. 1614.108 (1998).

[55] 63 Federal Register 8594, February 20, 1998.

[56] Hadley, *supra* note 39, at pg 1540. In *Mary L. Square v. Brown*, 95 FEOR 3018 (EEOC Comm., 08/25/94), the Commission noted that it generally did not consider compensatory damages claims raised for the first time in a Request For Reconsideration of a decision of EEOC's Office of Federal Operations (OFO). However, the Commission concluded that, if the case had to be remanded on other grounds, it would be appropriate for such a claim

with the assumptions made in the statutory scheme: (1) that the agency has the authority to investigate all of the issues related to the alleged discriminatory act, (2) that the agency has more resources and access to evidence than the employee, and (3) that many employees are lay people and not necessarily knowledgeable about their rights. To require an employee to give notice to an employing agency of specific relief assumes a more sophisticated employee than the statutory and regulatory scheme intended. It also assumes that the employee has equal resources as the agency, an assumption that is clearly inaccurate.

Since the employee does not direct or control the administrative process, he or she should not have the burden of requesting specific relief. Part and parcel of the control granted to the agency is the burden of inquiring after the specific relief that may arise out of the complaint. Placing the burden on an employee to request specific damages would require a sophisticated complaint and in essence, would require the employees to always seek legal advice. This requirement would make the system adversarial when it is currently not designed as such. The federal EEO structure is designed to be conciliatory.[57] Placing the burden on the agency, however, would not hinder the requirement of exhaustion of administrative remedies since the agency and/or EEOC may pursue any form of relief as it relates to the discriminatory act of which the employee is already required to give notice. That is why a federal employee does not fail to exhaust his or her administrative remedies by failing to request compensatory damages during the agency processing of, or EEOC review of, the discrimination claim and thus is not barred from addressing it at trial.

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to be addressed. Reconsideration of a decision from OFO is the absolute last stage of the comprehensive administrative complaint processing system found in Part 1614.

[57] See supra page 14.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be reversed, with instructions that the case be remanded to the District Court for a determination of compensatory damages.

Respectfully submitted,

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No. 98-238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TOGO D. WEST, JR., SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

Petitioner,

v.

MICHAEL GIBSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association ("NELA") is a voluntary membership organization of over 3,000 attorneys who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants for employment on claims arising out of the workplace. NELA has participated as *amicus curiae* in numerous employment cases before the state and federal appellate courts as well as the United States Supreme Court. Recent cases before this court include *Kolstad v. American Dental Association*, No. 98-208 (S.Ct., October Term, 1998); *Haddle v. Garrison*, No. 97-1472, 67 U.S.L.W. 4029 (U.S. Dec. 14, 1998); *Wright v. Universal Maritime Corp.*, ___ U.S. ___, 119 S.Ct. 391 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998); *Oubre v. Entergy Operations, Inc.*, 520 U.S. 1185, 117 S.Ct. 1466 (1997).

NELA has a compelling interest in ensuring that the goals of Title VII of the Civil Rights Act of 1964, as amended, are fully realized. Because the awarding of compensatory damages is critically important to the full enforcement of the statute for federal employees, NELA submits this brief to protect the interests of its mem-

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[1] Petitioner and Respondent have consented to the filing of this brief *amicus curiae*. The consents have been filed with the Clerk of this Court. No part of the attached brief has been authored by counsel for either party. No persons other than the *amicus curiae*, its members or their counsel made a monetary contribution to the preparation and submission of this brief.

bers' clients by ensuring that compensatory damages are available in the administrative EEO process under the standards established by the United States Congress.

SUMMARY OF THE ARGUMENT

This case presents the Court with an opportunity to clarify whether compensatory damages are available to federal employees during the administrative process under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* *Amicus* proposes that the Court reject the position of the Seventh Circuit Court of Appeals permitting compensatory damages only after a jury trial. Such a requirement, which prohibits the Equal Employment Opportunity Commission from continuing to award compensatory damages, is not in accord with the remedial purpose Congress intended when it amended the civil rights statutes to permit federal employees to receive compensatory damages. The Seventh Circuit's position is also contrary to Congress' broad delegation of authority to the EEOC to administer the statute and to award appropriate remedies to victims of discrimination. *See* 42 U.S.C. § 2000e-16(c) which authorizes the EEOC to award "appropriate remedies" against federal agencies that violate Title VII; and 42 U.S.C. § 1981a(a)(1) which recognizes that compensatory damages are an appropriate remedy for Title VII violations by federal agencies.

Amicus instead proposes that the Court adopt the rationale enunciated by the Fifth Circuit in *Fitzgerald v. Secretary, U.S. Dept. of Veterans Affairs*, 121 F.3d 203, 207 (5th Cir. 1997), that the EEOC is authorized

to award compensatory damages to federal employees during the administrative process, as it has broad discretion to award appropriate remedies to federal employees pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984):

> Regardless, the text of Title VII's remedial provisions demonstrates that compensatory damages are available in administrative proceedings. First, § 2000e-16(a) is a broad anti-discrimination provision prohibiting discrimination in federal employment. *See id.* § 2000e-16(a). Section 2000e-16(b) grants the EEOC wide-ranging authority to enforce the anti-discrimination provisions of subsection (a) through "appropriate remedies, including reinstatement or hiring of employees with or without back pay." *See id.* § 2000e-16(b). That subsection also directs the EEOC to "effectuate the policies of this section, and . . . issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." . . . When a federal employee suffers harm that may be remedied by compensatory damages, it is certainly necessary and appropriate for the EEOC to grant such relief. Given that the purpose of Title VII is to make injured claimants whole, *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 . . . (1975), we do not believe that Congress would have created an administrative process capable of providing only partial relief.

Fitzgerald, supra, at 207.

The adoption of the Seventh Circuit's decision is likely to have a disastrous impact on federal employees

who will encounter more difficulties in obtaining private counsel who will be faced with filing in district court, as well as with the EEOC, for all cases seeking compensatory damages. The lack of compensatory damages in the administrative process will discourage settlements and adversely impact the EEOC's increased emphasis on its alternative dispute resolution (ADR) program. As a result, many more cases will be filed in district courts by federal employee plaintiffs who are seeking compensatory damages as a part of their requested relief. Many, if not most, federal employees seek compensatory damages. The increased workload of the courts will only encourage federal agencies to further delay or refuse to settle cases until they are faced with a jury trial and the possibility of compensatory damages.

Nonetheless, the Seventh Circuit's decision was correct in finding that there was no need to exhaust administrative remedies concerning relief requested in order to receive compensatory damages in court. The purpose of the exhaustion requirement is not served by requiring a federal employee complainant to request the precise relief permitted by the statute when there is no such statutory or regulatory requirement. Because dissatisfied federal employees have the right to petition federal court for a *de novo* review of their claims, they should not be held to a heightened pleading requirement during the administrative process. At the very minimum, the relief should be contingent upon the "particular facts of the case," rather than making the request for relief a mandatory requirement.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH THE REMEDIAL PURPOSE CONGRESS INTENDED WHEN IT PERMITTED FEDERAL EMPLOYEES TO RECEIVE COMPENSATORY DAMAGES.

The decision of the Court of Appeals, *Gibson v. Brown*, 137 F.3d 992 (7th Cir. 1998), which effectively requires federal employee victims of discrimination to file in the appropriate United States District Court and succeed in a jury trial before receiving compensatory damages for pain and suffering, nullifies the remedial purpose of the statutory provisions for compensatory damages. Congress added compensatory damages as a remedy available for federal employees in 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, Tit. I, § 102, 105 Stat. 1072 (codified at 42 U.S.C. § 1981a(a)(1)). The Seventh Circuit, in *Gibson v. Brown, supra,* at 996-98, and the Eleventh Circuit in *Crawford v. Babbitt*, 148 F.3d 1318, 1323-26 (11th Cir. 1998), rely on the provision in Title VII allowing for jury trials and the Government's alleged failure to waive sovereign immunity as the bases for finding that the EEOC has no authority to award compensatory damages against federal agencies.

Nevertheless, it is clear that nowhere in Title VII did Congress expressly limit the EEOC's authority to award compensatory damages to federal employees. The Seventh Circuit admitted that Congress had expressly waived the government's sovereign immunity with respect to civil actions for compensatory damages under Title VII and "[n]othing in the statute or regulations explicitly rules out" the EEOC's awarding of compensa-

tory damages. *Gibson v. Brown, supra*, at 995. Furthermore, the court also conceded that "[i]t is not unreasonable to conclude" that the EEOC's statutory mandate to adjudicate Title VII claims against federal agencies "might be broad enough to award compensation for mental anguish and emotional distress." *Id.* In addition, there is no authority cited by the Seventh or Eleventh Circuit which requires Congress to explicitly waive sovereign immunity for the administrative process once it has waived it for the judicial process. The EEOC has maintained since 1992 that it is authorized to award compensatory damage awards against federal agencies where the complainants have claimed and proven such damages at the administrative level.[2]

The court's reliance on the provision for a jury trial before compensatory damages can be awarded is not persuasive. *Gibson v. Brown*, at 996, citing 42 U.S.C. § 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory . . . damages under this section," then "any party may demand a trial by jury." While it is accurate that only a claimant who is a federal employee may seek *de novo* relief in district court and a jury trial, an option which is not open to federal agencies, the Seventh Circuit placed far too much emphasis on depriving federal agencies of the "significant procedural right" to a jury trial on compensatory damages. *Gibson v. Brown, supra*, at 996. Congress recognized that the right to a jury trial primarily benefited

[2] *See Jackson v. United States Postal Service*, EEOC Appeal No. 01923399 (Nov. 12, 1992), slip op. at 407.

federal employees, not federal agencies that were concerned about disproportionately large jury awards.[3]

The statements of the various senators and representatives make it clear that they believed that jury trials advantage victims of discrimination while its provision would operate to the detriment of employers. *Id.* at n. 3. It is likely that Congress could have decided that the EEOC provides sufficient protection to federal agencies against inflated compensatory damages claims. In fact, the EEOC has been hesitant to award large compensatory damage awards, and its highest award is $130,000, as compared to a number of jury awards far in excess of $300,000.[4] In any event, the statutory cap of $300,000 per case, not $1,000,000 as suggested in Respondent's Brief in Opposition (Br. in Opp.) at 9, is also adequate protection against excess awards by the EEOC or district court juries, as punitive damages are not available against "a government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1).

[3] *See, e.g.*, 137 Cong. Rec. 28,926, 29,022, 030, 041, 053-054; 30,644, 668, 677, 690 (1991).

[4] *Cook v. United States Postal Service*, EEOC Appeal No. 01950027 (Jul. 17, 1998); *see, e.g., Nyman v. Federal Deposit Insurance Corporation*, 967 F.Supp. 1562 (D.D.C. 1997) (judge reduced compensatory damages from $350,000 to $175,000).

II. CONGRESS' CLEAR DESIGN IN TITLE VII TO ENCOURAGE THE RESOLUTION OF EMPLOYMENT DISCRIMINATION COMPLAINTS AGAINST FEDERAL AGENCIES AT THE ADMINISTRATIVE LEVEL WOULD BE UNDERMINED IF THE EEOC DID NOT HAVE AUTHORITY TO AWARD COMPENSATORY DAMAGES, AND A REMOVAL OF THAT AUTHORITY WILL RESULT IN AN INCREASED WORKLOAD FOR THE COURTS.

To limit the availability of compensatory damages to those federal employees who demand jury trials in district courts will adversely affect the requirement to exhaust the administrative EEO process. As noted in *Fitzgerald, supra*, at 207:

> Congress created the EEOC and established procedures so that aggrieved employees could "settle disputes through conference, conciliation, and persuasion" before they are permitted to file lawsuits. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 . . . (1974). If complainants could receive compensatory damages only in district court, they would be encouraged either to "intentionally bypass the administrative process and go straight to district court or perfunctorily go through the administrative process and then seek judicial relief to obtain full relief." *McAdams v. Reno*, 858 F.Supp. 945, 951 (D. Minn. 1994) (finding that compensatory damages are available in administrative proceedings), *aff'd on other grounds*, 64 F.3d 1137 (8th Cir. 1995).

The Seventh Circuit's decision is bound to have a significant impact on EEOC administrative practice as federal employees will insist upon subsequently filing in district court to obtain compensatory damages. This dual processing of Title VII complaints required to obtain full relief is likely to further complicate and lengthen the proceedings. Legal representation will be limited to those federal employees with sufficient resources to obtain private counsel or those whose cases have the promise of substantial relief. It is also well established that "Title VII claimants . . . often proceed *pro se* during the administrative investigation." *Fitzgerald v. Secretary, supra*, at 208. *Pro se* complainants will be especially affected, as it is bound to be more difficult to obtain competent counsel to take less significant cases to district court.

However, respondent contends that it will not be necessary to go to district court to obtain compensatory damages:

> . . . nothing in *Gibson* prohibits the EEOC or federal agencies from voluntarily offering compensatory damages to complainants in settlement, or as offers of full relief. The *Gibson* decision only prevents the EEOC from ordering compensatory damages where federal agencies would be deprived of the right to trial by jury. To the extent that the government desires to reduce congestion in the federal courts, it will be motivated to make fair settlement offers to victims of discrimination, including offers of compensatory damages.

Br. in Opp. at 9; *see also Crawford v. Babbitt, supra*, at 1326. Respondent's position is based on the rather questionable premise that federal agencies will waive their statutory rights and voluntarily offer to pay compensatory damages to "reduce congestion in the federal courts." It is highly unlikely that federal agencies in this era of tight budgets will offer any more relief than

is necessary or than would be required to avoid the risk of greater damages. Removing compensatory damages from the EEOC's arsenal of possible relief will only encourage federal agencies not to settle cases until after they have actually been filed in federal court where damages may be awarded, thus further clogging already congested court dockets. Further, it will preclude federal employees, who are unable or unwilling to file in district court, from effectively seeking compensatory damages and thus coerce that group into accepting less during settlement negotiations than to which they might otherwise be entitled.

Moreover, individual federal agencies, who will be represented by the Department of Justice in federal court, are not concerned about the courts' workload. If anything, the longer delays encountered by plaintiff-employees will work to the agency's benefit as any adverse awards will be further postponed. In addition, all court awards and court-approved settlements of compensatory damages come out of the General Accounting Office's Judgment Fund, rather than each agency's appropriation, thus providing another disincentive for federal agencies to settle at the administrative stage where the agencies are financially responsible for an adverse award. The respondent's conclusion that "the federal district courts will not be inundated with federal EEO claims" is a very unlikely scenario. Br. in Opp. at 9. In actuality, the federal district courts' dockets are already overloaded, and a new rush of federal EEO claims will only exacerbate the situation.

In addition, the removal of the EEOC's authority to award compensatory damages is likely to have a dis-

astrous impact on its ADR program which recently has been receiving more emphasis, including commentary by EEOC Chairwoman Ida Castro at the Commission's February 11, 1999, briefing (where the initiative for the project was announced). Bureau of National Affairs, *Employment Discrimination Report* 217 (Feb. 17, 1999). Only federal employees who do not seek compensatory damages, or those who are willing to give them up, will have any incentive to settle. Furthermore, as noted *supra*, there will be less incentive for federal agencies to settle. In the proposed rules for amendments to 29 C.F.R. § 1614, 63 Fed. Reg. 8594, 1998 WL 66453, issued February 20, 1998, the EEOC states that:

> The Commission proposes to amend section 1614.102 to require all agencies to establish or make available an alternative dispute resolution (ADR) program for the EEO pre-complaint process. The required pre-complaint ADR program would be in addition to the provisions in the current regulation that encourage the use of ADR at all stages of the complaint process. Agencies would be free to develop the programs that best suit their particular needs. While many agencies have adopted the mediation model as their ADR initiative, other resolution techniques would be acceptable, provided that they conform to the core principles set forth in Management Directive 110. Although ADR is believed to be most effective at the early stages of a dispute, agencies may continue their ADR efforts at any stage in the process, including after the formal complaint has been filed. An effective ADR program will serve both goals set out by the Commission. By resolving complaints early on, ADR will make the process more effi-

> cient. ADR will also serve to make the process fairer, by giving complainants an alternative to the counseling process that has been criticized by agency officials and employee representatives.

63 Fed. Reg. 8595.

The Commission also plans to enhance ADR by allowing attorney fees to be awarded for work done in the counseling period, including any ADR process, in proposed § 1614.501(e)(1)(v). 63 Fed. Reg. 8602, 8605. The inability of the EEOC to award compensatory damages is also likely to adversely impact its planned provision for offers of resolution, which allow an agency to make an offer at least 30 days prior to a hearing. *See* 63 Fed. Reg. 8603. Without the possibility of compensatory damages, agencies will have less incentive to make substantial offers of resolution.

Once compensatory damages are eliminated as part of the exhaustion requirement under 42 U.S.C. § 2000e-16(c), the administrative process will more than likely become an obstacle to settlement, rather than a method of resolving problems and reducing the workload of the federal courts. *See McKart v. United States,* 395 U.S. 185, 195 (1969) (pointing out that the administrative exhaustion requirements serve a "very practical notion of judicial efficiency," because the courts may never have to intervene if a complainant is "successful in vindicating his rights in the administrative process."). The EEOC is likely to have a similar situation as in its private sector program which usually serves as a way station to court. This will undermine the entire thrust of the EEOC's proposed rulemaking, which is to improve the ". . . effectiveness of the EEOC in enforcing the statutes that prohibit workplace discrimination in the federal government . . . ." 63 Fed. Reg. 8594.

According to the latest EEOC report, there were 26,140 administrative complaints filed against federal agencies in fiscal year 1996 which include Title VII, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. *See Federal Sector Report of EEO Complaints Processing and Appeals by Federal Agencies for Fiscal Year 1996* at 1. While the majority of these claims are resolved at the administrative (EEOC) level, this trend is likely to be reversed as agencies become less likely to offer compensatory damages. In fiscal year (FY) 1996, the EEOC closed 4,357 appeals of cases under Title VII, which often included compensatory damages as relief where discrimination was found. *Id.* at 74. During FY 1996, federal agencies awarded compensatory damages in the amount of $4,994,135.40 in complaints closed with corrective action. *Id.* at 46; *see also, e.g., Turner v. Babbitt,* EEOC Appeal No. 1956390 (Apr. 27, 1998), 1998 WL 223578, at *5-6 (which cites recent cases where the EEOC awarded compensatory damages). As noted in the Petition for Writ of Certiorari (Pet. Br.):

> If the EEOC does not have the authority to award compensatory damages against federal agencies, as the Seventh Circuit held, many such cases could not be closed at the administrative level and instead would reach the federal courts. And if, as the rationale of the Seventh Circuit's decision might suggest, federal agencies likewise cannot award compensatory damages at the first stage of the administrative

process, the burden on the federal courts would still be greater.

Id. at 13-14.

The Seventh Circuit's decision will also prohibit the Merit Systems Protection Board ("MSPB") and arbitrators from awarding compensatory damages. The MSPB has been awarding compensatory damages in "mixed cases" which involve serious personnel actions where the federal employee asserts an affirmative defense of discrimination, based on the EEOC's decision in *Jackson, supra*. *See Hocker v. Department of Transportation*, 63 M.S.P.R. 497, 505 (1994), *aff'd*, 64 F.3d 676 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1116 (1996). Arbitrators, who interpret collective bargaining agreements and decide both mixed cases and other cases where discrimination is alleged, are bound to follow the MSPB's substantive case law in adverse action cases. *Cornelius v. Nutt*, 472 U.S. 648, 105 S.Ct. 2882 (1985). The inability of the MSPB and arbitrators to award compensatory damages is also likely to affect the settlement of these difficult cases and will increase their chances of also ending up in the federal courts simply on the issue of damages. *See* 5 U.S.C. § 7703(b)(2); 7121.

III. THE DECISION OF THE COURT OF APPEALS BELOW WAS CORRECT IN FINDING THAT THERE WAS NO NEED TO EXHAUST ADMINISTRATIVE REMEDIES CONCERNING RELIEF REQUESTED IN ORDER TO RECEIVE COMPENSATORY DAMAGES IN COURT.

The Seventh Circuit found that petitioner did not exhaust his administrative remedies in regard to compensatory damages because he failed to put the EEOC

on notice that he was requesting such damages. However, the court below found that failure to exhaust was irrelevant because it would have been futile. *Gibson* at 994-995. There is no dispute that the exhaustion requirement is important and "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Gibson* at 995, *citing McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). However, the purpose of the exhaustion requirement is not served by requiring a federal employee to request the precise relief permitted by the statute, as opposed to requiring him to timely file his claim with his agency and/or the EEOC.

According to the Seventh Circuit, the district court below found that ". . . even if it interpreted the new claim as one seeking only relief (as we interpret it), *viz.* compensatory damages, the same rule of exhaustion would apply and require its dismissal." *Gibson* at 994. However, the district court specifically stated that "[t]he Court's review of all the objective evidence indicates that Gibson never asserted facts which would reasonably lead to compensatory damages during the administrative processing of his complaint." *Gibson v. Brown*, No. 96 C 223 (N.D. Ill. Oct. 3, 1996) (*cert.* petition at 23a, n. 2). Moreover, there is a substantial difference between holding federal employees to the administrative exhaustion requirement and requiring that they precisely state the relief requested under the amendments to Title VII. Because dissatisfied federal employees have the right to petition federal court for a *de novo* review of their claims, they should not be held accountable to a heightened pleading requirement during the administrative process. In fact, it is already

established that the remedy a successful claimant is entitled to flows from the claim asserted and may be amended at any time during the administrative process without restriction, including after receipt of an agency's certified offer of full relief and prior to hearing. *Carlson v. Secretary of the Navy*, EEOC Request No. 0590480 (Apr. 16, 1994); *Sloan v. U.S. Postal Service*, EEOC No. 03940166 (Feb. 9, 1995).

Once a case is already destined to be filed in federal court, permitting federal employees to amplify their claims in federal court to seek compensatory damages will not overly burden the courts. As most cases appear to be resolved prior to federal court, this should have little effect if the EEOC is determined to have authority to award compensatory damages. Only those complainants who are still unable to resolve their claims during the administrative process will be filing in federal court. It would also be inequitable to hold *pro se* federal employees to the same standard that represented employees are expected to follow. Furthermore, all federal employees, whether represented or *pro se*, already run the risk of having their administrative claims dismissed because of failure to accept an agency's offer of full relief without compensatory damages if they neglected to request compensatory damages during the administrative process. *See* 29 C.F.R. § 1614.107(h); *Fitzgerald, supra,* at 208-09.

In any event, the EEOC regulation which covers the filing of complaints only requires specific information as to the identities of the parties but is silent as to requests for relief. 29 C.F.R. § 1614.106. As correctly noted by Respondent:

> And the regulations charge both the employing agency and the EEOC with a duty to afford victims of discrimination "full relief," regardless of what the complainant writes in the "corrective action" box on the initial EEO complaint form. See 29 C.F.R. § 1614.501 and Appendix A to Part 1613.

Br. in Opp. at 5-6.

The Fifth Circuit also has struggled with this issue and still did not unequivocally state that it was necessary to state with specificity the relief requested in the administrative complaint:

> We note that the employee need not present his claim for compensatory damages in a legal or technical manner. He must, however, inform the employing agency or the EEOC of the *particular facts of the case* that demonstrate that he has suffered an emotional and/or mental injury that requires the payment of compensatory damages to make him whole. Such facts obviously must demonstrate more than the mere fact of forbidden discrimination or harassment. . . .

Fitzgerald, supra, at 208; *see also Barnett v. Secretary of the Treasury*, EEOC Appeal No. 01943513 (Feb. 15, 1995) (complainant not required to specifically request compensatory damages as relief, but sufficient that factual allegations in complaint put agency on notice concerning harm suffered). At the very minimum, this appears to be a reasonable middle-of-the-road position which makes relief contingent upon the "particular facts of the case," rather than making the request for relief a mandatory requirement.

CONCLUSION

For the foregoing reasons stated in this brief, *Amicus* asks this Court to reverse the opinion of the lower court to allow the EEOC to award compensatory damages. However, this Court should uphold the decision below in regard to waiving the exhaustion requirement for the relief requested.

Respectfully submitted,

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